



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



In the matter of:)
)
 [Name Redacted]) ISCR Case No. 18-01501
)
)
 Applicant for Security Clearance)

Appearances

For Government: Tara R. Karoian, Esquire, Department Counsel
For Applicant: *Pro se*

01/28/2019

Decision

HOGAN, Erin C., Administrative Judge:

On June 6, 2018, the Department of Defense (DOD) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under Guideline F, Financial Considerations. The action was taken 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) effective within the DOD on June 8, 2017.

On July 11, 2018, Applicant answered the SOR and requested a decision on the record. Department Counsel issued a File of Relevant Material (FORM) on September 5, 2018. On September 18, 2018, Applicant received the FORM. Applicant had 30 days to submit a response to the FORM. He timely submitted a response which is admitted as Item 9. Department Counsel had no objection to the documents Applicant submitted in response to the FORM. (Item 10) On October 23, 2018, the FORM was forwarded to the Hearing Office and assigned to me on December 17, 2018. Based upon a review of the pleadings, exhibits, and testimony, eligibility for access to classified information is denied.

Findings of Fact

Applicant is a 41-year-old employee of a DOD contractor seeking a security clearance. He has worked for his current employer since October 2010. His highest level of education is a high school diploma. He is divorced and has a 16-year-old son who lives with him. (Item 3)

On March 21, 2017, Applicant submitted an Electronic Questionnaire for Investigations Processing. (Item 3) A subsequent background investigation revealed Applicant had the following issues under the financial considerations concern: a Chapter 13 bankruptcy filed in August 2017, claiming approximately \$63,500 in outstanding liabilities (SOR ¶ 1.a: Item 4, Item 5 at 2; Item 6 at 2); a \$17,819 state tax lien entered against Applicant in 2011 (SOR ¶ 1.b: Item 7 at 2), a \$1,326 state tax lien entered against Applicant in 2012 (SOR ¶ 1.c: Item 7 at 2); a \$15,118 federal tax lien entered against Applicant in 2012 (SOR ¶ 1.d: Item 7 at 3); a \$3,912 judgment owed to a state entered against Applicant in 2017 (SOR ¶ 1.e: Item 5); Applicant failed to timely file his federal income tax returns from 2010 to 2015 (SOR ¶ 1.f: Item 8); and Applicant failed to timely file his state income tax return for tax year 2013. (SOR ¶ 1.g). In his response to the SOR, Applicant admits to all of the allegations. (Item 2)

Applicant encountered tax issues when he changed his W4 deductions in order to increase the size of his paycheck because he and his then wife wanted to pay off some debts so they could purchase a house. His wife was unfaithful and they divorced in 2008. A long custody battle for their son ensued. Applicant was also laid off between May 2009 and April 2010. (Item 3, section 13A; Item 8 at 5; Response to Form) Applicant failed to file tax returns or pay taxes from 2010 to 2015. He failed to file tax returns for those years because he was afraid to learn how much he owed in taxes. He estimates he filed tax returns for 2009 to 2011 a few years ago. He filed returns for tax years 2012 to 2014 on March 17, 2017. Applicant did not provide a copy of his tax returns. He estimates that he owes the Internal Revenue Service (IRS) a total amount of \$20,000. He did not provide any statements from the IRS, such as tax transcripts indicating the total amount owed to include tax and penalties. (Item 8 at 5)

Internal Revenue Service Publication 908, Bankruptcy Tax Guide (IRS Pub 908) states that the Bankruptcy Code requires Chapter 13 debtors to file all required tax returns for tax periods ending within four years of the debtor's bankruptcy filing. All federal tax returns must be filed before the date set for the first meeting of creditors. IRS Pub 908 also states that the Bankruptcy Code requires debtors to file tax returns that become due after commencement of the bankruptcy or obtain an extension for filing a return before the due date. If the debtor does not timely file federal tax returns, the bankruptcy court must dismiss or convert the case to another chapter of the Bankruptcy Code. Considering that the Bankruptcy Court approved Applicant's payment plan, it is likely he filed his federal tax returns.

On August 25, 2017, Applicant filed for bankruptcy under Chapter 13. He listed total assets of \$34,200 and total liabilities of \$62,529. Of that amount, approximately

\$20,997 consisted of taxes and other debts Applicant owed the government. (Item 4) During the bankruptcy proceedings, a state department of labor obtained a \$3,912 judgment against Applicant for receiving unemployment benefits between June 19, 2010, and July 24, 2010, when he was actually employed during that period. The Bankruptcy Court adjudged this debt as nondischargeable. (SOR ¶ 1.e; Item 5)

The Bankruptcy Court approved a five-year repayment plan where Applicant makes monthly payments of \$364.62 per pay period. The payment is deducted from his pay check. Applicant provided copies of his earnings statement from August 25, 2017, to September 27, 2018, which indicates that he is making payments towards his Chapter 13 plan on a regular basis. (Response to FORM) Applicant did not provide a complete copy of his Chapter 13 bankruptcy, to include his Chapter 13 repayment plan. As such, there is no information about which creditors are being paid under the Chapter 13 repayment plan.

Applicant states that he filed bankruptcy in order to stop the penalties and late payment fees that were building up because of his poor choices when he was younger. He wants to be responsible for his debts. (Response to FORM) In his answer to the SOR, Applicant provided a copy of a Satisfaction of Judgment regarding the \$17,819 state tax judgment alleged in SOR ¶ 1.b. (Item 2 at 4) SOR ¶ 1.b is found for Applicant. The status of the \$1,326 state tax lien (SOR ¶ 1.c) entered against Applicant in 2012 remains uncertain. Applicant did not discuss or provide evidence that he filed his state income return for tax year 2013. (SOR ¶ g)

Applicant admits he made many mistakes with his finances, but now believes he is on the correct path and is making sound financial decisions. He currently pays all of his bills on time. He is planning for his son's future, who is now a junior in high school. He takes pride in his work and would love the opportunity to apply his skill set to a new program that requires a security clearance. (Response to FORM)

Policies

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the AG. In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are useful 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 over-arching adjudicative goal is a fair, impartial and commonsense decision. According to AG ¶ 2(a), 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 for national security eligibility will be resolved in favor of the 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, the applicant is responsible for presenting “witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel. . . .” The applicant has the ultimate burden of persuasion as to 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 that the 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 EO 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 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. Affluence that cannot be explained by known sources of income is also a

security concern insofar as it may result from criminal activity, including espionage.

AG ¶ 19 notes several disqualifying conditions that could raise security concerns. The disqualifying conditions that are relevant to Applicant's case 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.

All of the above disqualifying conditions apply because Applicant incurred significant state and federal tax debts between 2010 to 2015. He failed to timely federal tax returns for those same years and failed to timely file his 2013 state tax returns. He filed for Chapter 13 bankruptcy in August 2017 because of his financial situation.

The security concern under Financial Considerations is broader than the possibility that a person might knowingly compromise classified information to obtain money or something else of value. It encompasses concerns about a person's self-control, judgment, and other important qualities.

The record establishes that Applicant failed to timely file his federal income tax returns for tax years 2010 through 2015, and a state income tax return in 2013. The DOHA Appeal Board has commented:

Failure to file tax returns suggests that an applicant has a problem with complying with well-established governmental rules and systems. Voluntary compliance with such rules and systems is essential for protecting classified information. ISCR Case No. 01-05340 at 3 (App. Bd. Dec. 20, 2002). As we have noted in the past, a clearance adjudication is not directed at collecting debts. See, e.g., ISCR Case No. 07-08049 at 5 (App. Bd. Jul. 22, 2008). By the same token, neither is it directed toward *inducing an applicant to file tax returns. Rather, it is a proceeding aimed at evaluating an applicant's judgment and reliability. Id.* A person who fails repeatedly to fulfill his or her legal obligations does not demonstrate the high degree of good judgment and reliability required of those granted access to classified information. See, e.g., ISCR Case No. 14-01894 at 5 (App. Bd. Aug. 18, 2015). See *Cafeteria & Restaurant Workers Union Local 473 v. McElroy*, 284 F.2d 173, 183 (D.C. Cir. 1960), *aff'd*, 367 U.S. 886 (1961).

ISCR Case No. 14-04437 at 3 (App. Bd. Apr. 15, 2016). See ISCR Case No. 14-05476 at 5 (App. Bd. Mar. 25, 2016) (citing ISCR Case No. 01-05340 at 3 (App. Bd. Dec. 20, 2002)); ISCR Case No. 14-01894 at 4-5 (App. Bd. Aug. 18, 2015). The Appeal Board

clarified that even in instances where an “[a]pplicant has purportedly corrected [the applicant’s] federal tax problem, and the fact that [applicant] is now motivated to prevent such problems in the future, does not preclude careful consideration of [a]pplicant’s security worthiness in light of [applicant’s] longstanding prior behavior evidencing irresponsibility” including a failure to timely file federal income tax returns. See ISCR Case No. 15-01031 at 3 and note 3 (App. Bd. June 15, 2016) (characterizing “no harm, no foul” approach to an Applicant’s course of conduct and employed an “all’s well that ends well” analysis as inadequate to support approval of access to classified information with focus on timing of filing of tax returns after receipt of the SOR).

The Government’s substantial evidence and Applicant’s admissions raised security concerns under Guideline F. The burden shifted to Applicant to produce evidence to rebut, explain, extenuate, or mitigate the security concerns. (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 ISCR Case No. 02-31154 at 5 (App. Bd. Sept. 22, 2005))

AG ¶ 20 includes examples of conditions that could mitigate security concerns arising from financial difficulties. The following mitigating conditions potentially apply:

- (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 financial counseling service, and there are clear indications 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; 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.

AG ¶ 20(a) does not apply because Applicant’s financial issues are ongoing. He intentionally did not file his income tax returns over a period of six years and is still paying the debt owed to the IRS, apparently through his Chapter 13 bankruptcy. While

Applicant provided proof that he made timely payments towards his Chapter 13 over a one-year period, four years remain on the Chapter 13 repayment plan. Considering the lengthy number of years Applicant failed to file his federal income tax returns, it is too soon to conclude such behavior will not be repeated.

AG ¶ 20(b) partially applies because circumstances beyond Applicant's control adversely affected his financial situation to include his divorce in 2008, custody battle and period of unemployment from 2009 to 2010. However, this mitigating condition is given less weight because Applicant did not timely file or pay his federal tax returns from 2010 to 2015. This occurred after his divorce. Applicant did not provide a sufficient reason for not timely filing and paying his federal income taxes. He did not file his returns because he was afraid of how much he owed. He did not act responsibly under the circumstances. For this reason, this mitigating condition is given less weight.

AG ¶ 20(c) partially applies. Applicant completed the financial counseling required by the Bankruptcy court as part of his bankruptcy filing. His financial situation appears to be under control and he appears to be meeting the terms of his payment plan. However, there are four years remaining on his Chapter 13 payment plan and it is too soon to predict that Applicant will make timely payments the full five years.

AG ¶ 20(d) applies with regard to the state tax judgment in SOR ¶ 1.b. Applicant provided proof in his Answer to the SOR that the judgment was satisfied in August 2012.

AG ¶ 20(g) does not apply because Applicant still has significant federal tax debt. While he filed Chapter 13 bankruptcy, he has not made a direct arrangement with the IRS to resolve his federal tax debt. He provided no evidence that he is working with state tax authorities regarding his failure to file his 2013 state tax returns.

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 the circumstances. The 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.

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 Applicant's employment history with a DOD contractor since October 2010. I considered that circumstances beyond his control contributed to his financial problems to include a divorce and custody battle. I considered that he has sole custody of his son. However, it was Applicant's responsibility to timely file his federal and state tax returns and pay any taxes owed. He did not file his federal tax returns from 2010 to 2015, resulting in a significant federal tax debt. He admitted that he did not file his 2013 state tax returns, but provided no updates on the status of 2013 state tax return. Applicant has taken positive steps towards resolving his federal tax debts through a Chapter 13 repayment plan. Considering his past history of failing to file his federal income tax returns over a six-year period, it is too soon to conclude Applicant will successfully complete the terms of his Chapter 13 payment plan. If he continues to make timely payments on his Chapter 13 payment plan, timely file and pay his federal and state tax returns, and his regular debts and expenses, he may qualify for a security clearance in the future. At this time, the security concerns raised under financial considerations are not mitigated.

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.c – 1.g:	Against Applicant
Subparagraph 1.b:	For Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with the interests of national security to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is denied.

ERIN C. HOGAN
Administrative Judge