



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



In the matter of:)	
)	
-----)	ISCR Case No. 12-05304
)	
Applicant for Security Clearance)	

Appearances

For Government: Candace L. Garcia, Esq., Department Counsel
For Applicant: Alan V. Edmunds, Esq.

12/31/2015

Decision

HARVEY, Mark, Administrative Judge:

Applicant’s statement of reasons (SOR) alleges one state tax lien and nine delinquent debts or collection accounts totaling \$32,316. The SOR also alleges he failed to file his federal and state tax returns for tax years 2000 through 2013. Seven of the ten SOR debts are mitigated. He did not make sufficient progress on two debts resulting from his repossessed vehicles, and on a debt resulting from a charged-off credit card. He did not file his state and federal tax returns for tax years 2000 through 2013. Financial considerations security concerns are not mitigated. Access to classified information is denied.

History of the Case

On December 2, 2011, Applicant completed and signed an Electronic Questionnaires for Investigations Processing (e-QIP) (SF 86). (Government Exhibit (GE) 1) On January 28, 2015, the Department of Defense (DOD) Consolidated Adjudications Facility (CAF) issued an SOR to Applicant pursuant to Executive Order (Exec. Or.) 10865, *Safeguarding Classified Information Within Industry*, dated February 20, 1960, as amended; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), dated January 2, 1992, as amended; and the adjudicative guidelines (AG), which became effective on September 1, 2006.

The SOR detailed reasons why the DOD CAF could not make the affirmative finding under the Directive that it is clearly consistent with the national interest to grant

or continue a security clearance for him, and recommended referral to an administrative judge to determine whether a clearance should be granted, continued, denied, or revoked. (Hearing Exhibit (HE) 2) Specifically, the SOR set forth security concerns arising under the financial considerations guideline.

On March 9, 2015, Applicant responded to the SOR, and he requested a hearing. On July 2, 2015, Department Counsel was ready to proceed. On September 21, 2015, the Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing, setting the hearing for October 19, 2015. (HE 1) The hearing was held as scheduled. During the hearing, Department Counsel offered eight exhibits, which were admitted into evidence without objection, and Applicant offered the 15 exhibits attached to the SOR response and one additional exhibit, which were admitted without objection. (Transcript (Tr.) 9-11; Government Exhibit (GE) 1-8; Applicant Exhibit (AE) A-P) On October 29, 2015, Applicant provided five additional exhibits, which were admitted without objection. (AE P-T) The record closed on October 29, 2015. (Tr. 84) On November 2, 2015, I received a transcript of the hearing.

Findings of Fact

In Applicant's SOR response, he denied all of the SOR allegations, and he also provided some admissions as well as extenuating and mitigating information. Applicant's admissions are accepted as findings of fact.

Applicant is a 42-year-old senior technical writer employed by a defense contractor since August 2011. (Tr. 12, 15, 42, 52) He has held a security clearance from 1992 to present. (Tr. 22) A security clearance is required for him to retain his employment. (Tr. 51) In 1991, he graduated from high school. (Tr. 51) He has not attended college. (Tr. 51) He served on active duty in the Navy from 1991 to 2000. (Tr. 23) In 1991, he married, and his children were born in 1992, 1994, 1996, 1997, and 2000. (Tr. 24; GE 1; AE P)

From February 2000 to August 2000, Applicant was deployed on a Navy ship. (Tr. 13) His spouse took their children and moved to a different state. (Tr. 13, 23) When Applicant returned from deployment, his wife stayed in a different state from Applicant, and he and his spouse have been separated thereafter. (Tr. 14) His spouse made allegations against Applicant that were unsubstantiated. (Tr. 21-22) Applicant was unable to reenlist because of "the administrative burden my wife was placing on the command," and he received an honorable discharge. (Tr. 15, 21-22) In 2000, his spouse retained a \$4,500 tax refund. (Tr. 25) He believes she is not employed outside her home. (Tr. 58-59) Applicant filed for divorce in March 2015. (Tr. 12, 56; AE P)

Applicant's salary is \$74,000. (Tr. 50) He pays his required child support of \$400 monthly through an automatic payment from his salary. (Tr. 15, 24, 38-39, 59) A state child support summary indicates a credit of \$15,365. (AE S) Applicant was employed from 2000 to September 2011. (Tr. 54) He was unemployed from October 2013 to about October 2014. (Tr. 43; AE H) His salary has varied by about \$15,000 over the last ten years. (Tr. 43)

Financial Considerations

Applicant's history of delinquent debt is documented in his credit reports, SF 86, SOR response, and hearing record. In his 2011 SF 86, he disclosed the following financial information: the debts in SOR ¶¶ 1.a and 1.h were from two vehicle repossessions; he failed to file his 2010 federal and state tax returns (he estimated he would not owe any taxes); he paid a company travel-card debt late; he paid a state judgment from 1996; and the debt owed to the original creditor in SOR ¶ 1.b resulted from a charged-off credit card. Applicant's SOR alleges and the record establishes the following financial information:

SOR ¶ 1.a is a collection debt for \$9,300 resulting from a vehicle repossessed in 2008. (Tr. 16, 25; SOR response) SOR ¶ 1.b is a collection debt for \$1,395 resulting from a credit card. Applicant said he has been negotiating with the creditors for two or three years. (Tr. 17, 26) He did not provide updated information on the status of these two debts.

SOR ¶ 1.c alleges a collection debt originating from a bank for \$661. Applicant is disputing his responsibility for this debt because he is unsure about it. (Tr. 17, 26) He did not contact the creditor to find out about the debt. (Tr. 27-28)

SOR ¶ 1.d alleges a state tax lien for \$4,362. A judgment was issued in September 2011. (AE T) Applicant said he has a payment plan with the state. (Tr. 18) He said he established a payment plan about four or five years ago, and he is consistently paying \$190 monthly to the state. (Tr. 28-29) The judgment was satisfied in September 2014. (AE T)

SOR ¶ 1.e alleges a medical debt for \$61. Applicant said it should be paid. (Tr. 18, 29) He said he contacted the creditor; the creditor was unable to provide information about the debt; the debt no longer appears on his credit report; and therefore, he was unable to pay it. (AE P)

SOR ¶ 1.f alleges a telecommunications collection debt for \$341. Applicant said he disputed the debt, and the creditor did not have any record of the debt. (Tr. 18, 29-30; AE P)

SOR ¶ 1.g alleges a debt owed to the Defense Finance and Accounting Service (DFAS) for \$5,312. He said it was possible he owed the money from his time on active duty; however, he did not "specifically" recognize the debt. (Tr. 18, 31) He disputed his responsibility for the debt; however, he did not contact DFAS about the debt. (Tr. 18, 32) His June 2015 credit report shows a zero balance owed to DFAS. (GE 8)

SOR ¶ 1.h alleges a \$10,777 debt arising from a vehicle repossession. His SOR response indicates the relevant vehicle was repossessed in 2009. He was not sure about his responsibility for this debt, and he disputed it. (Tr. 19, 32) He has not contacted the creditor about the debt. (Tr. 32)

SOR ¶ 1.i alleges a medical debt for \$55. Applicant said this debt should be paid. (Tr. 19, 32) He said he contacted the creditor; the creditor was unable to provide information about the debt; and the debt no longer appears on his credit report. (AE P)

SOR ¶ 1.j alleges an insurance collection debt for \$52. Applicant said he disputed the debt, and the creditor did not have any record of the debt. (Tr. 19, 32-33) He disputed the entry on his credit report; and the debt no longer appears on his credit report. (AE P; GE 8)

SOR ¶¶ 1.k and 1.l allege that Applicant failed to file his state and federal income tax returns for tax years 2000 through 2013. In March 2014, he requested transcripts from the Internal Revenue Service (IRS); however, the IRS did not provide the transcripts. (Tr. 37; GE 3) In February 2015, Applicant wrote and sought assistance from his state to address his state taxes and from an IRS representative. (Tr. 27; AE E; AE F) Applicant had part of his salary withheld for taxes. (Tr. 57) He received correspondence from the IRS; however, he did not respond to the IRS's inquiries. (Tr. 60) Applicant said his tax returns were still unfiled. (Tr. 19, 52) He did not know if his spouse had filed tax returns or whether she claimed their children as dependents. (Tr. 34, 46) He has very little communication with his spouse. (Tr. 45) He believed he could not file his tax returns without information from his spouse and her signatures on tax forms. (Tr. 20, 49) Applicant has not filed his tax returns for 2014.¹ (Tr. 44) He provided confirmation numbers for seven payments to the state tax authority from March to October 2015; however, he did not explain how much he owed the state tax authority or describe which tax year his payments were addressing. (AE P)

On February 23, 2015, Applicant wrote the three major credit reporting companies to either dispute or verify the debts in SOR ¶¶ 1.a through 1.l. (Tr. 16, 33; AE B-D) Applicant said he has received financial counseling; he is staying current on his debts; and he took action to correct the deficiencies listed on his SOR. (Tr. 21, 39; AE G) He said he has been more financially responsible the last two or three years. (Tr. 35) He said he will never do anything that will jeopardize national security. (Tr. 60) The Government provided a June 2015 credit report from a credit reporting company that

¹The SOR did not allege that: (1) he failed to disclose his failure to file his state and federal tax returns from 2000 to 2009 on his 2011 SF 86; (2) he failed to file his state and federal income tax returns for 2014; and (3) willful failure to file return, supply information, or pay tax may constitute a misdemeanor under 26 U.S.C. § 7203. See note 2, *infra*. In ISCR Case No. 03-20327 at 4 (App. Bd. Oct. 26, 2006) the Appeal Board listed five circumstances in which conduct not alleged in an SOR may be considered stating:

- (a) to assess an applicant's credibility; (b) to evaluate an applicant's evidence of extenuation, mitigation, or changed circumstances; (c) to consider whether an applicant has demonstrated successful rehabilitation; (d) to decide whether a particular provision of the Adjudicative Guidelines is applicable; or (e) to provide evidence for whole person analysis under Directive Section 6.3.

(citing ISCR Case No. 02-07218 at 3 (App. Bd. Mar. 15, 2004); ISCR Case No. 00-0633 at 3 (App. Bd. Oct. 24, 2003)). I have considered the non-SOR evidence related to these issues for the four purposes (reasons (b) to (e)), and not for any other purpose.

either did not include an entry for any of the SOR creditors, or indicated the SOR creditors showed a zero balance. (GE 8)

Character Evidence

Applicant's coworkers, a supervisor, a roommate, and friends have known Applicant for several years and describe him as having leadership qualities and being reliable, diligent, honest, professional, reliable, conscientious about following the rules, and trustworthy. (AE I-O) Their statements support continuation of his security clearance.

A facility security officer has worked with Applicant for four years, and he described Applicant as a top performer, an honorable person, a vital part of the company's team, and a patriot, who should have a security clearance. (Tr. 63-73; AE M) Applicant is an intelligent, detail-oriented person. (Tr. 72)

The former owner and program manager of the company employing Applicant retired as a commander from the Navy. (Tr. 75) He has employed Applicant for about four years. (Tr. 76; AE L) He considers Applicant to be trustworthy, professional, honest, and has excellent character. (Tr. 79) He recommends continuation of Applicant's security clearance. (Tr. 82)

Policies

The U.S. Supreme Court has recognized the substantial discretion of the Executive Branch in regulating access to information pertaining to national security emphasizing, "no 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 applicant's 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, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960), as amended.

Eligibility for a security clearance is predicated upon the applicant meeting the criteria contained in the revised adjudicative guidelines. These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied 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, 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 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 “in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.” See Exec. Or. 10865 § 7. This decision is not based, in whole or in part, on any express or implied determination about applicant’s allegiance, loyalty, or patriotism. Thus, any 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. See *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 ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996).

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 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). The burden of disproving a mitigating condition never shifts to the Government. See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005). “[S]ecurity clearance determinations should err, if they must, on the side of denials.” *Egan*, 484 U.S. at 531; see AG ¶ 2(b).

Analysis

Financial Considerations

AG ¶ 18 articulates the security concern relating to financial problems:

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 provides three disqualifying conditions that could raise a security concern and may be disqualifying in this case: “(a) inability or unwillingness to satisfy debts;” “(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’s history of delinquent debt is documented in his credit reports, SF 86,

SOR response, and hearing record. Applicant's SOR alleges, and the evidence establishes that he had two repossessed vehicles, resulting in the debts alleged in SOR ¶¶ 1.a (\$9,300) and 1.h (\$10,777) and a charged-off credit card debt in SOR ¶ 1.b (\$1,395). The SOR also alleges he failed to file his federal and state tax returns for tax years 2000 to 2013. The Government established the disqualifying conditions in AG ¶¶ 19(a), 19(c), and 19(g) requiring additional inquiry about the possible applicability of mitigating conditions.

Five mitigating conditions under AG ¶ 20 are potentially applicable:

(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, or a death, divorce or separation), and the individual acted responsibly under the circumstances;

(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;

(d) the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts;² and

(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.

The Appeal Board concisely explained Applicant's responsibility for proving the applicability of mitigating conditions as follows:

²The 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) in order to claim the benefit of [the "good faith" mitigating 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)).

Once a concern arises regarding an Applicant's security clearance eligibility, there is a strong presumption against the grant or maintenance of a security clearance. See *Dorfmont v. Brown*, 913 F. 2d 1399, 1401 (9th Cir. 1990), *cert. denied*, 499 U.S. 905 (1991). After the Government presents evidence raising security concerns, the burden shifts to the applicant to rebut or mitigate those concerns. See Directive ¶ E3.1.15. The standard applicable in security clearance decisions is that articulated in *Egan, supra*. "Any doubt concerning personnel being considered for access to classified information will be resolved in favor of the national security." Directive, Enclosure 2 ¶ 2(b).

ISCR Case No. 10-04641 at 4 (App. Bd. Sept. 24, 2013).

AG ¶ 20(e) applies to all of the debts, except for the two debts involving repossession of his vehicles in SOR ¶¶ 1.a (\$9,300) and 1.h (\$10,777) and a charged-off credit card in SOR ¶ 1.b (\$1,395). I have credited Applicant with mitigating the other SOR debts because they are either paid or disputed and removed from his credit report. He initially disclosed the debts in SOR ¶¶ 1.a, 1.b, and 1.h on his 2011 SF 86, and he did not provide any evidence of payments or other debt resolution for these three substantial debts.

Applicant also receives some credit because of separation from his spouse and family, variations in income, and unemployment. These are all circumstances beyond his control which adversely affected his finances. He received financial counseling.

Applicant's failure to timely file his state and federal tax returns for 2000 through 2013 and pay his taxes raises the most significant security concern. The federal government considers failure to file federal income tax returns important enough to warrant making that conduct a federal criminal offense under 26 U.S.C. § 7203.³ On January 28, 2015, the SOR was issued, and Applicant learned that his failure to file his tax returns raised a security concern. He has not filed his tax returns. Financial considerations security concerns are not mitigated.

³26 U.S.C. § 7203, willful failure to file return, supply information, or pay tax, provides:

Any person required under this title to pay any estimated tax or tax, or required by this title or by regulations made under authority thereof to make a return, keep any records, or supply any information, who willfully fails to pay such estimated tax or tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than \$25,000 (\$100,000 in the case of a corporation), or imprisoned not more than 1 year, or both, together with the costs of prosecution.

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(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. I have incorporated my comments under Guideline F in my whole-person analysis. Some of the factors in AG ¶ 2(a) were addressed under Guideline F, but some warrant additional comment.

Applicant has achieved important employment goals, demonstrating some self-discipline, responsibility, and dedication; however, this evidence is insufficient to mitigate security concerns. Applicant is a 42-year-old senior technical writer employed by defense contractors after leaving the Navy in 2000. He honorably served on active duty in the Navy from 1991 to 2000. Applicant's child support is current, and his child support account shows a credit of \$15,365. He has held a security clearance from 1992 to present. Several circumstances adversely affected his finances: he was unemployed from October 2013 to about October 2014; he has been separated from his family since 2000; his spouse refused to give him information about their taxes; and his income has varied over the last 15 years. Applicant's credit reports or SOR allege one state tax lien and nine delinquent debts or collection accounts totaling \$32,316. Seven of the ten SOR debts are mitigated. Several character statements and two witnesses lauded Applicant's duty performance, leadership, trustworthiness, integrity, and noted that he made important contributions to his company. There is no evidence of any security or employment rule violations, alcohol abuse, use of illegal drugs, or felonious criminal conduct.

The adverse financial information is more significant. He did not make sufficient progress resolving the three debts resulting from two repossessed vehicles in SOR ¶¶ 1.a (\$9,300) and 1.h (\$10,777) and a charged-off credit card debt in SOR ¶ 1.b (\$1,395). He did not file his state and federal income tax returns for tax years 2000 through 2014.⁴

⁴The Appeal Board has recently reversed three grants of security clearances involving failures to file or pay federal income taxes. See ISCR Case No. 14-03358 at 3, 5 (App. Bd. Oct. 9, 2015) (stating "A

I have carefully applied the law, as set forth in *Egan*, Exec. Or. 10865, the Directive, and the AGs, to the facts and circumstances in the context of the whole person. Financial considerations concerns 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 and 1.b:	Against Applicant
Subparagraphs 1.c through 1.g:	For Applicant
Subparagraph 1.h:	Against Applicant
Subparagraphs 1.i and 1.j:	For Applicant
Subparagraphs 1.k and 1.l:	Against Applicant

Conclusion

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

MARK HARVEY
Administrative Judge

security clearance represents an obligation to the Federal Government for the protection of national secrets. Accordingly failure to honor other obligations to the Government has a direct bearing on an applicant's reliability, trustworthiness, and ability to protect classified information."); ISCR Case No. 14-01894 at 2-6 (App. Bd. Aug. 18, 2015) (emphasizing the applicant's failure to timely file and pay taxes); ISCR Case No. 12-05053 at 4 (App. Bd. Oct. 30, 2014) (noting not all tax returns were filed, and an insufficient discussion of Applicant's efforts to resolve tax liens).