



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



In the matter of:)	
)	
)	ISCR Case No. 12-06065
)	
)	
Applicant for Security Clearance)	

Appearances

For Government: Julie R. Mendez, Esquire, Department Counsel
For Applicant: Kevin A. Peck, Esquire

06/18/2014

Decision

WHITE, David M., Administrative Judge:

Applicant incurred substantial delinquent indebtedness on Federal income taxes due from 2008 through 20011, and on his home mortgage. The evidence is insufficient to mitigate resulting security concerns. Based upon a review of the pleadings, testimony, and exhibits, eligibility for access to classified information is denied.

Statement of the Case

Applicant submitted a security clearance application (SF 86) on November 8, 2011. On September 10, 2013, 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 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the *Adjudicative Guidelines for Determining Eligibility for Access to Classified Information*, effective within the Department of Defense after September 1, 2006.

Applicant answered the SOR in an undated writing (AR) that was received by the Defense Office of Hearings and Appeals (DOHA) on October 16, 2013, and requested a hearing before an administrative judge. Department Counsel was prepared to proceed

on November 25, 2013. The case was assigned to me on December 3, 2013. DOHA issued a Notice of Video Teleconference Hearing on January 14, 2014, and I convened the hearing, as scheduled but in an alternate location, on January 27, 2014. Applicant, his counsel and witness, and the court reporter attended the hearing in person. Department Counsel participated from DOHA Headquarters by video teleconference. The Government offered Exhibits (GE) 1 through 3, which were admitted without objection. Applicant offered Exhibits (AE) A through H, and Hearing Exhibit (HE) I, a trial memorandum, which were admitted without objection. Applicant and one witness testified on his behalf. I granted Applicant's request to leave the record open until February 10, 2014, for submission of additional evidence. DOHA received the transcript of the hearing (Tr.) on February 6, 2014. Applicant timely submitted AE J,¹ which was admitted without objection and the record closed.

Findings of Fact

Applicant is a 48-year-old employee of a defense contractor, where he has worked since August 2011. He is married, with five children, ages 12, 18, 22, 26, and 28. The youngest three children still live with him and his wife. He graduated from high school in 1983, and earned an Airframes and Powerplant Certificate from a vocational school in 1987. He has no military service, and has not previously applied for or held a security clearance. His father was a naval aviator who was shot down over Viet Nam in 1966, and was missing in action until ultimately declared deceased in about 1980. Applicant's son also served in the Navy for five years. (GE 1; Tr. 19, 29-30, 34-35, 94.)

In his response to the SOR, Applicant admitted the allegations concerning delinquent Federal income tax and mortgage debts set forth in SOR ¶¶ 1.a through 1.c, with explanations. Applicant's admissions, including his statements in response to DOHA interrogatories (GE 3), are incorporated in the following findings.

Applicant worked for his current employer from 1987 to 1989 as an aircraft structures mechanic. He then went to work for a major airline company as a flight line technician, eventually earning about \$89,000 per year. His employment at the airline was terminated in June 2011 for abuse of sick leave, after having received previous notices placing him on "sick leave watch" for having six or more sick leave occurrences per year. While appealing his termination from the airline, he obtained his current employment as a Flight Test Aviation Maintenance Technician in August 2011. He has since earned \$20,000 to \$32,000 less per year than he was being paid when he left the airline.² During his two months of unemployment between jobs, after leaving the airline in June 2011, he received \$550 per week in unemployment compensation. (GE 1 at 10-12; Tr. 31-34, 58-60.)

¹There is no exhibit marked "AE I."

²Applicant provided no pay records to document his current gross income. He variously estimated it to be between \$57,120 to \$69,000 per year in different uncorroborated statements. See GE 3 at 7; AE J at 5; Tr. 34, 72.

Applicant's wife worked in a job that paid her around \$35,000 to \$40,000 per year from 2006 to May 2009, when she was laid off due to the closure of her facility. She was then unemployed until February 2012, when she obtained new employment, in which she earns a similar amount. (GE 3 at 7; AE J at 5; Tr. 48, 61, 92.)

Applicant and his wife purchased their home in May 2002 for \$369,000, with a mortgage loan of \$351,000 and monthly payments of \$2,824. In December 2006, they refinanced the home with a cash-out fixed-rate mortgage loan of \$558,000 requiring monthly payments of about \$4,200. They used the \$190,000 to \$210,000 in cash-out equity to repay about \$40,000 toward a Federal income tax lien to the Internal Revenue Service (IRS), to pay off a used-car loan, to purchase a piano, to pay other small bills, and to put about \$5,000 in their savings account.³ (GE 2; Tr. 65-68.)

Applicant was unable to make the new mortgage payments starting in 2009, when his wife was laid off. Over the succeeding years, he negotiated a series of three mortgage modifications, reducing his monthly payment to around \$3,700. Nevertheless, as he admitted in his response to SOR ¶ 1.c, he fell about \$70,000 behind in payments. This represents about 19 months worth of payments, although it accrued over a longer period since Applicant testified that, "sometimes we would pay half of the payment, half of the mortgage payment. It was just a big struggle." (Tr. 70.) In August 2013, Applicant agreed to make "Trial Period Plan" payments of \$3,547 in September and October 2013, in an effort to obtain approval of another mortgage modification. He testified that he made those payments. (AE C; Tr. 49-50, 69-71.)

Applicant's mortgage lender recently sold the loan to the current holder, with whom he negotiated another modification agreement that was accepted by the creditor in January 2014. This agreement covers a total debt of \$620,005; comprising \$519,213 in unpaid principal, \$88,214 in unpaid interest, and \$12,578 in an unpaid escrow balance due. The agreement calls for deferment of the unpaid interest for five years. Applicant will have to make five years of \$2,596 interest-only payments (at 6.0%) on the principal balance and \$896 escrow payments, for a total monthly payment of \$3,492. At the end of the five-year "reduction period" under the agreement, the original terms of Applicant's mortgage loan will become effective, and he will still owe the full principal balance and deferred interest amount. (AE B; AE D; AE H; Tr. 50-51, 75-79.)

In 2008, in order to increase his available income, Applicant reduced his Federal income tax withholding. This resulted in the \$10,567 delinquent tax debt to the IRS, as alleged in SOR ¶ 1.a. In 2011 he entered into an agreement to pay the IRS \$200 per month toward this debt, but could not afford to make these payments and is currently considered to be in an "uncollectible" status. (AR; GE 3; Tr. 40-41, 80.)

³Applicant's testimony and memory were vague concerning their use of these funds. It appears from GE 2 that they refinanced the original \$351,000 mortgage in November 2004 for \$450,000 and refinanced again in October 2005 for \$497,000. This would mean that only about \$61,000 in equity was cashed out in 2006; a figure that is more consistent with the expenditures that Applicant testified about. He did not explain how he spent the roughly \$150,000 in equity funds from the two previous refinancing loans.

When Applicant's employment was terminated by the airline in June 2011, the outstanding balance on about \$14,000 for a loan he had taken from his 401(k) plan became due and he withdrew the remaining \$16,000 from the plan to meet living expenses. This resulted in a 20% tax penalty on those funds. The resulting 2011 Federal income tax delinquency was combined with about \$12,000 in tax delinquencies from 2009 and 2010 to generate the \$21,351 IRS tax lien described in SOR ¶ 1.b, which is also in an uncollectible status. (AR; GE 3; Tr. 46, 63, 81-82.)

Applicant provided documentation of one \$200 payment in January 2014 toward the 2008 tax debt, and of the application of his \$741 IRS refund for 2012 taxes toward his 2009 tax delinquency. He testified that he had paid about \$2,000 to \$3,000 toward delinquent taxes, but still owed about \$10,000 toward 2008 taxes and had made no other payments toward the 2009 through 2011 delinquencies. He also admitted that he has no current repayment plan in effect for any of these IRS delinquencies. (AR; GE 3; AE A; AE B; Tr. 40-41, 45-46, 61-65, 74, 80-82.)

In late January 2014, Applicant began attending the three-week Goodwill Industries "Key to Change Financial Education Course." This involves a 12-hour curriculum covering goal setting, monthly spending plans, banking basics, account management, borrowing money, insurance, how to read a credit report, and saving money. The program coordinator anticipated that he would complete the classes on February 20, 2014. He testified that he finds the class to be "helpful" and "very informative." (AE F; AE G; Tr. 51-52.)

Applicant provided two financial statements, without supporting documentation, showing different income amounts and expense estimates. He also testified about his budget. Several significant discrepancies and unreasonable estimates reduce the credibility of the estimated monthly surpluses, particularly in light of his financial history. For example, the budgeted deductions from gross to net salary are inconsistent with his claim that he corrected a previous pattern of under-withholding Federal income taxes, and his car expense figures and descriptions are inconsistent. He failed to document consistent payments under any of his various repayment plans toward either his mortgage or his IRS delinquencies. (GE 3 at 7; AE J; Tr. 72-74, 84-86.)

Applicant provided no evidence concerning the quality of his professional performance, the level of responsibility his duties entail, or his track record with respect to handling sensitive information and observation of security procedures. He submitted no character references describing his judgment, trustworthiness, integrity, or reliability, other than testimony from his wife, who stated that he is a great husband and father who gives generously to others in need.

Policies

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the adjudicative guidelines (AG). In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially

disqualifying conditions (DCs) and mitigating conditions (MCs), which are to be used 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 AG ¶ 2 describing the adjudicative process. The administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense decision. According to AG ¶¶ 2(a) and 2(c), the entire process is a conscientious scrutiny of applicable guidelines in the context 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 to classified information 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. Likewise, I have avoided drawing inferences grounded on mere speculation or conjecture.

Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, "[t]he applicant is responsible for presenting witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by the applicant or proven by Department Counsel, and has the ultimate burden of persuasion as to obtaining a favorable clearance decision." Section 7 of Executive Order 10865 provides: "[a]ny determination under this order adverse to an applicant shall be a determination in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned."

A person applying for access to classified information seeks to enter 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 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.

Analysis

Guideline F, Financial Considerations

The security concerns under the guideline for financial considerations are set out in AG ¶ 18, which reads in pertinent part:

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.

The record evidence potentially raises security concerns under two Guideline F DCs, as set forth in AG ¶ 19:

- (a) inability or unwillingness to satisfy debts; and
- (c) a history of not meeting financial obligations.

Applicant established a pattern of spending beyond his means that dates to before 2008, when the first SOR-listed delinquencies arose. He accrued about \$32,000 in Federal income tax indebtedness for tax years 2008 through 2011, and was able to document less than \$1,000 in payments toward that debt. He owes more than \$620,000 on his home mortgage loan, which he has not consistently paid on a timely basis since 2009. This loan is secured by property for which he paid \$369,000 in 2002. His most recent mortgage loan modification calls for him to make payments only for interest on the outstanding principal and escrow obligations over the next five years, but he did not demonstrate that he will be able to do so. This evidence raised significant security concerns under DCs 19(a) and (c), thereby shifting the burden to Applicant to rebut, extenuate, or mitigate those concerns.

The guideline includes five conditions in AG ¶ 20 that could mitigate security concerns arising from Applicant's financial difficulties:

- (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; 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.

Applicant's three SOR-listed delinquent debts are recent and ongoing, without indication that the circumstances under which they arose have changed. He used about \$40,000 of his 2006 cash-out mortgage refinancing to repay previous tax delinquencies to the IRS that were not alleged in the SOR. He therefore failed to establish substantial mitigation under MC 20(a).

Applicant also offered insufficient evidence to support significant mitigation under MC 20(b). His brief period of unemployment in 2011 was caused by a job termination for abuse of sick leave, and he received substantial unemployment compensation during that time. Most of his Federal income tax delinquency was caused by his choice to under-withhold for tax years 2008 through 2011, and the remainder was caused by his choice to borrow against and withdraw the balance of his 401(k) retirement savings. He failed to comply with his original IRS repayment plan, and has no current agreement to resolve these tax debts. He has recently negotiated the most recent of multiple mortgage loan modifications, but has not consistently met his mortgage obligations since 2009 or demonstrated that he can meet this one.

Applicant did not undergo financial counseling until entering a 12-hour Goodwill Industries program just prior to his hearing. He neither documented any substantially effective effort to repay or otherwise resolve any of the SOR-listed delinquent debts, nor asserted a legitimate basis to dispute their validity. These facts preclude significant mitigation under MC 20(c), (d), or (e).

"An applicant is not required to show that [he] has completely paid off [his] indebtedness, only that [he] has established a reasonable plan to resolve [his] debts and has 'taken significant actions to implement that plan.'" ISCR Case No. 06-12930 at 2 (App. Bd. Mar. 17, 2008) (quoting ISCR Case No. 04-09684 at 2-3 (App. Bd. Jul. 6, 2006)). Applicant has made various agreements to resolve his SOR-listed delinquencies, but has not demonstrated any success in complying with them, or in reducing the underlying obligations.

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(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 considered the potentially disqualifying and mitigating conditions in light of all pertinent facts and circumstances surrounding this case. Applicant has voluntarily incurred substantial delinquent indebtedness to the IRS and in mortgage obligations that he could not and cannot currently afford to repay. These debts remain outstanding, creating the ongoing potential for pressure and duress. The evidence does not support a finding that continuation or recurrence are unlikely, or that behavioral changes demonstrate rehabilitation. He is a mature and experienced individual who is accountable for his choices and financial irresponsibility. Overall, the record evidence creates ongoing doubt as to Applicant's present eligibility and suitability for a security clearance.

Formal Findings

Formal findings for or against Applicant on the allegations set forth in the SOR, as required by ¶ E3.1.25 of Enclosure 3 of the Directive, are:

Paragraph 1, Guideline F:	AGAINST APPLICANT
Subparagraph 1.a:	Against Applicant
Subparagraph 1.b:	Against Applicant
Subparagraph 1.c:	Against Applicant

Conclusion

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

DAVID M. WHITE
Administrative Judge