



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



In the matter of:)
)
XXXXXXXXXX, XXXXX) ISCR Case No. 12-08972
)
Applicant for Security Clearance)

Appearances

For Government: David F. Hayes, Esq., Department Counsel
For Applicant: *Pro se*

02/10/2016

Decision

TUIDER, Robert J., Administrative Judge:

Applicant failed to mitigate security concerns regarding Guideline F (financial considerations). Clearance is denied.

Statement of the Case

On March 2, 2012, Applicant submitted a Questionnaire for National Security Positions (SF-86). On April 30, 2015, the Department of Defense Consolidated Adjudications Facility (DOD CAF) issued a Statement of Reasons (SOR) to Applicant, under Executive Order 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 alleged security concerns under Guideline F. The SOR detailed reasons why DOD CAF was unable to find that it is clearly consistent with the national interest to continue a security clearance for Applicant, and referred his case to an

administrative judge for a determination whether his clearance should be granted or denied.

Applicant answered the SOR on July 11, 2015, and elected to have his case decided on the written record in lieu of a hearing. A complete copy of the file of relevant material (FORM), dated September 17, 2015, was provided to him by letter dated September 22, 2015. Applicant received the FORM on October 2, 2015. He was afforded a period of 30 days to file objections and submit material in refutation, extenuation, or mitigation. Applicant timely submitted additional information within the 30-day period, which was received without objection.¹ On December 1, 2015, the case was assigned to me.

Findings of Fact

In his answer to the SOR, Applicant provided a lengthy narrative response that neither affirmatively admitted or denied the SOR allegations, as instructed.

Background Information²

Applicant is a 58-year-old senior technical specialist employed by a defense contractor since February 2000. He seeks a security clearance in conjunction with his current employment. (Items 2, 3)

Applicant was awarded a bachelor's degree in 1980 and a master's degree in 1984. He did not serve in the armed forces. (Item 2) Applicant married in 1988. There is no record of dependents in the FORM. (Item 2)

Financial Considerations

Applicant's SOR lists five allegations: (1) a 2007 state tax lien for \$13,722; (2) a 2014 state tax lien for \$7,898; (3) a failure to timely file federal tax returns for tax years 2006, 2009, and 2010 -- as of the SOR date, 2009 and 2010 federal tax returns had not been filed; (4) a failure to timely file state tax returns for tax years 2006, 2009, and 2010 -- as of the SOR date, these tax returns had not been filed; and (5) an unpaid \$49 medical debt. (SOR ¶¶ 1.a - 1.e)

During Applicant's April 2012 Office of Personnel Management Personal Subject Interview (OPM PSI), he stated that he had filed extensions for his federal and state taxes for the past ten years because he was overwhelmed with paperwork. He was not overly concerned with filing because the federal and state tax authorities were receiving their needed taxes through paycheck withholdings. (Item 3) During that same interview, he claimed that he filed 2009 and 2011 state and federal tax returns and that he did not owe any taxes for either year. (Item 3)

¹ Applicant's additional information will be referred to as FORM response.

² The limited background information regarding Applicant was derived from the FORM and was the most current information available.

In his July 2015 SOR answer, Applicant stated that his issue is “not really one of financial problems *per se*, but of disorganization.” (Item 1) He discussed various aspects of his financial and tax history, but provided no relevant documentation that addressed the specific concerns raised in the SOR. Applicant also stated that he expected to have his “filings current by the end of the year.” (Item 1) Department Counsel put Applicant on notice of his financial shortcomings and deficiencies in documentation in his FORM.

Applicant’s FORM response did little to enhance his situation. He provided documentation from his certified public accountant (CPA) that he had filed his 2006 federal tax return late, but no documentation that addressed his remaining federal and state tax returns. Applicant did provide documentation that his state had levied \$18,057.61 against his bank account on January 7, 2015, that according to Applicant “may address a. and possibly part of b.” It is unclear from the documentation whether this levy applies to one, both, or part of the two state tax liens alleged. (FORM response) In both his SOR answer and in his FORM response, Applicant mentioned that he has a CPA, and in his FORM response, he stated that his CPA would address his tax returns. (Item 1, FORM response) Applicant provided documentation that he paid his \$49 medical debt in July 2015. (FORM response)

There is no record evidence of financial counseling. Applicant stated that “these financial issues seem to paralyze me. I would much rather be addressing the technical issues associated with training pilots or now, the additional duties of caring for my elderly father.” (FORM response)

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 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. See also Executive Order 12968 (Aug. 2, 1995), § 3.1. Thus, nothing in this Decision should be construed to suggest that I have based this decision, in whole or in part, on any express or implied determination about applicant’s allegiance, loyalty, or patriotism. It 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 her 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 for 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.”

In ISCR Case No. 08-12184 at 7 (App. Bd. Jan. 7, 2010), the Appeal Board explained:

It is well-settled that adverse information from a credit report can normally meet the substantial evidence standard and the government’s obligations under [Directive] ¶ E3.1.14 for pertinent allegations. At that point, the burden shifts to applicant to establish either that [he or] she is not responsible for the debt or that matters in mitigation apply.

(internal citation omitted). Applicant’s history of financial problems is documented not only in his credit report, but also in the additional evidence submitted by Department Counsel. (Items 2 – 6) The evidence establishes the validity of the allegations and 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; 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.

Considering the record evidence as a whole,³ AG ¶ 20(d) applies to the \$49 medical debt alleged in SOR ¶ 1.e, but does not apply to the 2007 and 2014 state tax liens alleged in SOR ¶¶ 1.a and 1.b. Waiting for a state tax authority to levy against your bank account is not indicative of a good-faith effort to repay creditors. Apart from the \$49 medical debt, none of the five financial considerations mitigating conditions above are applicable or partially applicable to explain, extenuate, or mitigate the remaining SOR allegations. The available information shows that Applicant has taken little or no affirmative action to resolve the financial shortcomings.

It is also somewhat perplexing that an individual with Applicant's level of education and job responsibilities with access to a CPA would allow his financial state of affairs to deteriorate to the extent that they have. Applicant was put on notice on at least three separate occasions that these matters were a concern to the Government -- during his April 2012 OPM PSI, after receiving his April 2015 SOR, and after receiving his September 2015 FORM.

With that said, a security clearance case is not aimed at collecting debts.⁴ Rather the purpose is to evaluate an applicant's judgment, reliability, and trustworthiness consistent with the security guidelines in the Directive. In evaluating Guideline F cases, the Appeal Board has established the following standard:

The Board has previously noted that the concept of a meaningful track record necessarily includes evidence of actual debt reduction through payment of debts. However, an applicant is not required, as a matter of law, to establish that [she] has paid off each and every debt listed in the SOR. All that is required is that an applicant demonstrate that [she] has established a plan to resolve [her] financial problems and taken significant actions to implement that plan. The Judge can reasonably consider the entirety of an applicant's financial situation and his actions in evaluating the extent to which that applicant's plan for the reduction of [her] outstanding indebtedness is credible and realistic. There is no requirement that a plan provide for payments on all outstanding debts simultaneously. Rather, a reasonable plan (and concomitant conduct) may provide for the payments of such debts one at a time. Likewise, there is no requirement that the first debts actually paid in furtherance of a reasonable debt plan be the ones listed in the SOR.⁵

In requesting an administrative determination, Applicant chose to rely on the written record. In so doing, however, he failed to submit sufficient evidence to

³ See ISCR Case No. 03-02374 at 4 (App. Bd. Jan. 26, 2006) (citing ISCR Case No. 02-22173 at 4 (App. Bd. May 26, 2004)). When making a recency analysis for AG ¶ 20(a), all debts are considered as a whole.

⁴ ISCR Case No. 09-02160 (App. Bd. Jun. 21, 2010).

⁵ ISCR Case No. 07-06482 at 3 (App. Bd. May 21, 2008) (citations and quotation marks omitted).

supplement the record with relevant and material facts regarding his circumstances, articulate his position, and mitigate the financial security concerns. He failed to offer evidence of financial counseling or provide documentation regarding his past efforts to address his delinquent debt. By failing to provide such information, and in relying on a explanation, lacking sufficient detail to fully establish mitigation, financial considerations security concerns remain.

After weighing the relevant disqualifying and mitigating conditions and evaluating the evidence in light of the whole-person concept,⁶ I conclude Applicant did not present sufficient evidence to explain, extenuate, and mitigate the Guideline F security concern. Accordingly, Applicant has not met his ultimate burden of persuasion to show that it is clearly consistent with the national interest to grant his eligibility for access to classified information.

Formal Findings

The formal findings on the SOR are as follows:

Paragraph 1, Guideline F:	AGAINST APPLICANT
Subparagraphs 1.a – 1.d:	Against Applicant
Subparagraph 1.e:	For Applicant

Conclusion

In light of all of the record as a whole, it is not clearly consistent with the national interest to grant Applicant eligibility for a security clearance. Clearance is denied.

ROBERT J. TUIDER
Administrative Judge

⁶ AG ¶ 2(a) (1)-(9).