



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



In the matter of:)
)
) ISCR Case No. 14-02743
)
Applicant for Security Clearance)

Appearances

For Government: Gina Marine, Esq., Department Counsel
For Applicant: *Pro se*

06/29/2015

Decision

DUFFY, James F., Administrative Judge:

Applicant failed to mitigate the security concerns under Guidelines F (financial considerations) and Guideline E (personal conduct). Clearance is denied.

Statement of the Case

On August 1, 2014, the Department of Defense (DOD) issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guidelines F and E. This action was taken 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*, dated January 2, 1992, as amended (Directive); and the adjudicative guidelines (AG) implemented on September 1, 2006.

The SOR detailed reasons why DOD adjudicators could not make the affirmative finding under the Directive that it is clearly consistent with the national interest to grant Applicant's security clearance. On September 16, 2014, Applicant answered the SOR and requested a decision based on the administrative record in lieu of a hearing. On

October 14, 2014, Department Counsel submitted a request for a hearing, which was marked as Hearing Exhibit (HE) 1. The case was assigned to me on January 22, 2015. DOHA issued a notice of hearing on February 11, 2015, and the hearing was convened as scheduled on February 23, 2015. Applicant waived the 15-day hearing notice requirement in ¶ E3.1.8 of the Directive.¹

At the hearing, Department Counsel offered Government Exhibits (GE) 1 through 6. Applicant testified and submitted Applicant Exhibits (AE) A through E. The record of the proceeding was left open until March 9, 2015, to provide Applicant the opportunity to submit additional matters. Applicant timely submitted documents that have been marked as AE F through N. All exhibits were admitted into evidence without objection. DOHA received the hearing transcript (Tr.) on March 4, 2015.

Findings of Fact

Background Information. Applicant, 51, has been working for a defense contractor since August 2007. He graduated from high school in 1982. He attended college for about four years, but has not yet received a degree. He served in the U.S. Air Force from 1983 to 1992 and received an honorable discharge. He has been married and divorced twice. In July 2013, he began residing with a cohabitant. He has one child, age 24, and two stepchildren, ages 21 and 38. He has a deceased stepchild. He held a security clearance in the Air Force.²

Allegations and Applicant's Response. Under Guideline F, the SOR alleged that Applicant failed to file his federal income tax returns for 2005 and 2006 as required (SOR ¶ 1.a); that he had a federal tax lien for \$61,808 entered against him in about December 2011 (SOR ¶ 1.b); and that he was indebted to a bank in the amount of \$43,362 as a result of an unpaid court-approved settlement executed in April 2010 (SOR ¶ 1.c). SOR ¶ 1.a was cross-alleged as the sole allegation under Guideline E (SOR ¶ 2.a). In his Answer to the SOR, Applicant admitted the three Guideline F allegations and did not respond to the Guideline E allegation.³

Applicant's Reasons of the Financial Problems. Applicant attributed his financial problems to family problems. Between 2003 and 2008, he went through what he described as a "rough period" with his stepdaughter and daughter. His stepdaughter had an alcohol and drug addiction. She committed suicide in 2013. He also stated his daughter was a drug addict. He indicated that he took care of paying for things they stole or damaged and for paying their court fees. During this difficult period, he also worked in Korea for a year. He further indicated that his first divorce set him back financially. He married his first wife in August 1986 and they divorced in September

¹ Tr. 11-12.

² Tr. 6-7, 59; GE 1.

³ Applicant's Answer to the SOR.

2003. He took responsibility for \$30,000 of his first wife's credit card debt, which is alleged in SOR ¶ 1.c. In July 2004, he was laid off from a job and was self-employed until he was hired by his current employer.⁴

SOR ¶ 1.a – failure to file federal income tax returns for 2005 and 2006 as required. In his Electronic Questionnaire for Investigations Processing (e-QIP) dated January 31, 2014, Applicant disclosed that he had not filed his 2005 and 2006 federal income tax returns as required. He indicated that he owed about \$20,000 in taxes for each year. He stated that he had no excuse for not filing, that he was not avoiding the payment of taxes, and that he would resolve these issues “this year.”⁵

In about 2011, Applicant hired a tax resolution company to assist him with his tax problems. At the time of the hearing, Applicant still had not filed his 2005 federal income tax return, but indicated that he planned to do so. He attributed his failure to file that income tax return to difficulty in obtaining data from a computer hard drive. He indicated that he recently had the hard drive reconfigured so that the data could be retrieved from it. However, he also acknowledged the failure to file was his fault because he did not pursue this manner properly.⁶

At the time of the hearing, Applicant still had not filed his 2006 federal income tax return. In April 2014, he received an IRS Account Transcript for 2006 that showed he had an account balance of zero. He believed he did not have to file that return after receiving the account transcript. He also stated that he thought the tax resolution company negotiated an agreement with the IRS so he did not have to file his 2006 income tax return. The account transcript further reflected no tax return had been filed and listed no information in the spaces for Adjusted Gross Income, Taxable Income, Tax Per Return, Self-employment Income Taxpayer, Self-employment Income Spouse, and Total Self-employment Tax.⁷

The IRS advises taxpayers that “Regardless of your reason for not filing a required return, file your tax return as soon as possible.” Penalties may be imposed for failing to file a tax return as required or failing to pay taxes as required. “[T]he statute of limitations for the IRS to assess and collect any outstanding balances does not start until a return has been filed. In other words, there is no statute of limitations for assessing and collecting tax if no return has been filed.”⁸

⁴ Tr. 37-39, 60, 67-70.

⁵ GE 1.

⁶ Tr. 38, 50-52, 60-61, 65-67.

⁷ Tr. 38, 50-52, 60-61, 65-67; AE D.

⁸ See <http://www.irs.gov/taxtopics/tc153.html> and <http://www.irs.gov/uac/Failure-to-File-or-Pay-Penalties:-Eight-Facts>.

Applicant testified that he filed his federal income tax returns for 2007 through 2013 and stated he did not owe any past-due taxes for those years. He noted he was entitled to refunds for those years, but the refunds were withheld for payment of his past-due taxes as discussed below.⁹

SOR ¶ 1.b – federal tax lien entered against him for \$61,808 in December 2011. On December 29, 2011, Applicant had the following federal tax lien filed against him:

Kind of Tax	Tax Period Ending	Date of Assessment	Unpaid Balance
1040	12/31/2003	07/26/2010	\$15,460.34
1040	12/31/2004	05/26/2008	\$21,004.66
1040	12/31/2005	05/26/2008	\$25,343.92
Total			\$61,808.92

Applicant was self-employed when he incurred this tax liability and was aware before the tax lien was filed that he owed the IRS for back taxes. When asked why he did not address the past-due taxes before the lien was filed, he again reiterated that he was going through a stressful time with his family and was focused on them.

As early as February 2012, Applicant entered into an Installment Agreement with the IRS to resolve the past-due taxes. A letter from the tax resolution company dated September 3, 2014, indicated that the IRS reinstated the Installment Agreement with monthly payments due of \$514. Applicant explained the reinstatement by stating that, when the tax liability for a particular year was satisfied, the IRS would notify his employer to stop making the payments. He would then need to reestablish the payments for the remaining tax liability. An email from the tax resolution company dated September 14, 2014, indicated the tax liability for 2004 was paid off in April 2014 and his tax liability for 2003 was paid off in August 2014. Another letter from the company dated September 3, 2014, estimated his total remaining tax liability was \$27,387, which was for tax year 2005. His pay stub for the two-week pay period ending December 31, 2014, showed that he paid \$257 under the Installment Agreement during that period and paid \$6,168 under the agreement for the year, which confirmed he made 12 monthly payments of \$514 in 2014.¹⁰

SOR ¶ 1.c – indebtedness on a court-approved settlement in the amount of \$43,362. This debt was for a credit card used by Applicant's first wife. He took responsibility for this debt during the divorce. At a later point, he fell behind on the payments. In 2010, he entered into a court-approved settlement to pay the creditor the sum of \$43,362 over a five-year period. He was to pay \$400 for the first six months and then pay \$759 for the remaining 54 months. He testified that he made some of those payments but missed others. When asked why he stopped making the payment, he said

⁹ Tr. 38, 50-52, 60-61, 65-67; AE D.

¹⁰ Tr. 38, 52-57, 61-62; GE 5; AE A, B, C, E, J.

he was negligent and forgot about it. A credit report dated February 26, 2014, reflected that the account had a date of last activity of March 2011 and a balance of \$30,708. The creditor eventually charged off this debt. On December 16, 2013, the creditor cancelled the debt and issued him an IRS Form 1099-C. The amount of the canceled debt was \$30,050. He claimed that he had three years to address the IRS Form 1099-C on his federal income tax return because a tax accountant gave him that advice many years ago. He intended to address the IRS Form 1099-C in his 2014 federal income tax return. Although subject to various exemptions and exclusions, a canceled debt is treated as ordinary income.¹¹

Financial Situation. Applicant earns \$78,000 annually from the defense contractor and about \$20,000 annually from a business that he operates. Since working for the defense contractor, his annual earnings have increased about \$11,000. He shares living expenses with his girlfriend. In 2013, he went to Mexico twice with her. He estimated each of these trips cost him \$1,200. In 2012 he took a trip to Aruba, which also cost him about \$1,200. He stated that his financial situation has improved in recent years.¹²

Character Evidence. Applicant submitted character reference letters that described him as professional, honest, and trustworthy. His work performance appraisals for 2010 and 2013 reflected that he was fully competent and very diligent in the performance of his duties.¹³

Policies

The President of the United States 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. *Department of the Navy v. Egan*, 484 U.S. 518, 527 (1988). The President has authorized the Secretary of Defense to grant 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. The U.S. Supreme Court has recognized the substantial discretion of the Executive Branch in regulating access to information pertaining to national security, emphasizing that “no one has a ‘right’ to a security clearance.” *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988).

Eligibility for a security clearance is predicated upon the applicant meeting the criteria contained in the adjudicative guidelines. These AGs are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are

¹¹ Tr. 37, 43-52, 62-63; GE 3, 4, 6; AE E. See also: <http://www.irs.gov/pub/irs-prior/p4681--2013.pdf>

¹² Tr. 38-43, 57-64; GE 2; AE B.

¹³ AE G, H, I, L, N.

applied in conjunction with an evaluation of the whole person. An administrative judge's 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, in reaching a decision.

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 of 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), Section 3. Thus, a clearance decision is merely an indication that the Applicant has or 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 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 or 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

Guideline F, Financial Considerations

The security concern for financial considerations is set out in AG ¶ 18 as follows:

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 guideline notes several conditions that could raise security concerns under AG ¶ 19. Three are potentially applicable 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

Applicant failed to file his federal income tax returns for 2005 and 2006 as required. He accumulated past-due taxes and a delinquent debt that he was unable to pay for an extended period. The evidence is sufficient to raise the above disqualifying conditions.

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

Applicant failed to file his 2005 and 2006 federal income tax returns. In his e-QIP, he acknowledged that he had no excuse for failing to file those tax returns. Although he has known that his failure to file those tax returns created a security concern since submission of his e-QIP, he still has not filed them. Contrary to this claim, he failed to establish that the IRS excused him from filing his 2006 federal income tax return. According to his 2006 IRS Account Transcript, the IRS is reporting him as having no

income that year, which most likely explains why the IRS is also reporting his account balance as “zero” for that year. The accuracy of the information in his 2006 Account Transcript is questionable because he has not filed a federal income tax return for that year. From the evidence presented, I am not persuaded he owes no past-due federal income taxes for 2006. Until he files his 2006 federal income tax return, a determination of whether or not he owes past-due taxes for that year cannot be made. His failure to file his 2005 and 2006 federal income tax returns continues to cast doubt on his current reliability, trustworthiness, and good judgment. None of the mitigating conditions applies to his failure to file those income tax returns.

In December 2011, the IRS filed a \$61,808 tax lien against Applicant for past-due taxes for 2003-2005. As early as 2012, Applicant began making payments on the tax lien. He paid off the past-due taxes for 2003 and 2004. In 2014, he paid \$6,168 toward this debt. The balance owed on the tax lien has been reduced to about \$25,000. He established a meaningful track record of payment on this debt. AG ¶ 20(d) applies to this debt.

In April 2010, Applicant agreed to pay a creditor \$43,362 over a five-year period as part of a court-approved settlement. He made some of the monthly payments, but eventually defaulted. He acknowledged that the default was due to his negligence. The creditor charged off the debt and issued him an IRS Form 1099-C in December 2013. Applicant did not report the canceled debt as ordinary income on his 2013 federal income tax return. He claimed he had three years in which to report the canceled debt on his federal income tax return, but provided no proof establishing that such a delay was permitted. None of the mitigating conditions apply to this debt.

Guideline E, Personal Conduct

The security concern for personal conduct is set out in AG ¶ 15, as follows:

Conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations can raise questions about an individual’s reliability, trustworthiness and ability to protect classified information. Of special interest is any failure to provide truthful and candid answers during the security clearance process or any other failure to cooperate with the security clearance process.

AG ¶ 16 describes two conditions that could raise a security concern and may be disqualifying in this case:

(c) credible adverse information in several adjudicative issue areas that is not sufficient for an adverse determination under any other single guideline, but which, when considered as a whole, supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and

regulations, or other characteristics indicating that the person may not properly safeguard protected information; and

(d) credible adverse information that is not explicitly covered under any other guideline and may not be sufficient by itself for an adverse determination, but which, when combined with all available information supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the person may not properly safeguard protected information. This includes but is not limited to consideration of:

(1) untrustworthy or unreliable behavior to include breach of client confidentiality, release of proprietary information, unauthorized release of sensitive corporate or other government protected information;

* * *

(3) a pattern of dishonesty or rule violations.

Applicant failed to file his federal income tax returns for 2005 and 2006 as required. Such a failure reflects a lack of reliability and unwillingness to comply with rules and regulations. Both of the above disqualifying conditions apply.

Two personal conduct mitigation conditions under AG ¶ 17 are potentially applicable:

(c) the offense is so minor, or so much time has passed, or the behavior is so infrequent, or it happened under such unique circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment; and

(d) the individual has acknowledged the behavior and obtained counseling to change the behavior or taken other positive steps to alleviate the stressors, circumstances, or factors that caused untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur.

For the reasons discussed under Guideline F above, I find that none of the Guideline E mitigating conditions apply to Applicant's failure to file his 2005 and 2006 federal income 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 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.

My comments under Guidelines F and E are incorporated in this whole-person analysis. Some of the factors in AG ¶ 2(a) were addressed under those guidelines, but some warrant additional comment.

In rendering this decision, I considered all of the record evidence, including Applicant's military service and his work history. Despite the presence of some mitigation, he failed to mitigate the security concerns arising from his failure to file his federal income tax returns for 2005 and 2006 and his failure to pay a court approved settlement.

Overall, the record evidence leaves me with questions and doubts as to his eligibility and suitability for a security clearance. Applicant failed to mitigate the security concerns under the financial considerations and personal conduct guidelines.

Formal Findings

Formal findings as required by Section E3.1.25 of Enclosure 3 of the Directive are:

Paragraph 1, Guideline F:	Against Applicant
Subparagraph 1.a:	Against Applicant
Subparagraph 1.b:	For Applicant
Subparagraph 1.c:	Against Applicant
Paragraph 2, Guideline E:	Against Applicant
Subparagraph 2.a:	Against Applicant

Decision

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

James F. Duffy
Administrative Judge