



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



In the matter of:)
)
) ISCR Case No. 14-02962
)
Applicant for Security Clearance)

Appearances

For Government: Richard Stevens, Esq., Department Counsel
For Applicant: *Pro se*

01/15/2015

Decision

DUFFY, James F., Administrative Judge:

Applicant failed to mitigate the security concerns arising under Guideline F, financial considerations. Eligibility for access to classified information is denied.

Statement of the Case

On August 8, 2014, the Department of Defense Consolidated Adjudications Facility (DOD CAF) issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guideline F. This action was taken under Executive Order 10865, *Safeguarding Classified Information Within Industry*, dated February 20, 1960, as amended; Department of Defense 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 CAF could not make the preliminary affirmative finding under the Directive that it is clearly consistent with the national

interest to grant Applicant a security clearance. On August 22, 2013, Applicant answered the SOR and requested a hearing. This case was assigned to me on October 30, 2014. On November 5, 2014, the Defense Office of Hearings and Appeals (DOHA) issued a Notice of Video Teleconference Hearing scheduling the hearing for November 14, 2014. The hearing was held as scheduled.¹

At the hearing, Department Counsel offered Government Exhibits (GE) 1 through 3, while Applicant testified and offered Applicant Exhibits (AE) A through H. The record of the proceeding was left open until November 28, 2014, to provide Applicant an opportunity to present additional matters. He timely submitted documents that were marked as AE I through P. Applicant's objection to GE 3, a credit report, was overruled. All other proffered exhibits were admitted into evidence without objection. Department Counsel's memorandum forwarding Applicant's post-hearing submission was marked as Hearing Exhibit (HE) 1. The transcript (Tr.) of the hearing was received on November 24, 2014.

Findings of Fact

Applicant is a 40-year-old employee of a defense contractor. He has been working for that employer since March 2014. He graduated from high school in 1992 and attended about three years of college without earning a degree. He is divorced. His marriage was from June 2007 to November 2011. He has an eight-year-old daughter. This is the first time that he is seeking a security clearance.²

The SOR alleged that Applicant had seven delinquent debts, totaling \$74,131. In his Answer to the SOR, Applicant admitted the allegations in SOR ¶¶ 1.a through 1.c and denied the remaining allegations. His admissions are incorporated as findings of fact.³

In 1994, Applicant began working in his uncle's business. In 2005, Applicant became the owner and operator of that business. His business had three employees besides himself. Due to a downturn in the economy, his business slowed in about 2008. His cash flow became irregular, making it difficult for him to meet his financial obligations. In August 2011, his business closed. Since then, he experienced periods of unemployment or underemployment until he obtained his current job. He also went through a divorce in 2011.⁴

¹ Applicant waived the 15-day hearing notice requirement under Paragraph E3.1.8 of the Directive. See Tr. 12-13, 30.

² Tr. 6-7, 40-44; GE 1, 2.

³ Applicant's Answer to the SOR.

⁴ Tr. 31-36, 44-51, 61-79; GE 1, 2; AE B, G, F, J; Applicant's Answer to the SOR.

SOR ¶ 1.a – unpaid federal taxes in the amount of \$19,142 for tax year 2008 and \$7,530 for tax year 2010; **SOR ¶ 1.b** – federal tax lien filed in September 2011 in the amount of \$26,672; **SOR ¶ 1.c** – unpaid federal taxes in the amount of \$2,211 for tax period ending 6/30/10, \$2,797 for tax period ending 9/30/10, and \$1,899 for tax period ending 12/31/10. The two unpaid tax amounts listed in SOR ¶ 1.a total exactly the amount of the tax lien reflected in SOR ¶ 1.b. Department Counsel agreed that the debts alleged in SOR ¶¶ 1.a and 1.b are duplicates. I also find that the amount alleged in SOR ¶ 1.a for tax year 2010 is a duplicate of the three unpaid quarterly payments alleged in SOR ¶ 1.c for tax year 2010. The three unpaid quarterly payments total \$6,907, which is close to (\$623 less than) the amount of unpaid taxes for 2010 reflected in SOR ¶ 1.a.⁵

In his Electronic Questionnaire for Investigations Processing (e-QIP), Applicant disclosed that he owed the Internal Revenue Service (IRS) about \$48,000 in back taxes, had hired a tax lawyer to assist him, and indicated that this matter was resolved. In an Office of Personnel Management interview, he reportedly told the investigator his tax liens were resolved and the IRS had forgiven a significant portion of the tax debt. When questioned about these matters at the hearing, he stated he hired a tax attorney in 2011 after the IRS filed a tax lien on his house. He also explained that he intended to say in his e-QIP and at the OPM interview that his tax debts were in an uncollectable status because he was not making enough money at that time and that collection action on those debts was deferred.⁶

Applicant initially owed \$36,269 in taxes when he filed his 2008 IRS Form 1040. As of October 27, 2014, his 2008 tax liability has been reduced to \$27,301. In his Answer to the SOR, Applicant stated that he owed \$10,179 to the IRS for tax year 2010, which he indicated was in an uncollectable status until he resolved his 2008 tax debt. In his Answer, he also provided an IRS Form 9465, Installment Agreement Request dated August 19, 2014, for tax years 2008 through 2012. This form was prepared by his tax preparer. It did not list the total amount of unpaid taxes for those tax years as required, but indicated that he could pay \$200 per month toward the unpaid taxes. No documentation was submitted to show that the IRS agreed to his installment agreement request, but he did provide an IRS document dated October 1, 2014, reflecting the address where he should send his payments. He provided copies of check stubs showing that he made \$200 payments under the installment agreement on August 20th, September 27th, October 28th, and November 10th of 2014. A bank record confirmed one

⁵ Tr. 72-78. The tax lien in SOR ¶ 1.b is reflected in a credit report, GE 3. Applicant admitted the unpaid taxes in SOR ¶¶ 1.a and 1.c; however, independent evidence was not submitted establishing those unpaid taxes. Consequently, the bases for the exact figures alleged in SOR ¶¶ 1.a and 1.c are unknown.

⁶ Tr. 67-70; GE 1, 2.

of those payments. He intends to continue making the payments until the unpaid tax debt is resolved.⁷

SOR ¶ 1.d – charged-off account for \$11,735. This was a vehicle loan that had a date of last activity of May 2011. In a divorce decree dated November 3, 2011, Applicant's ex-wife was granted full ownership of this vehicle. She also agreed to assume financial responsibility for the vehicle and to hold him harmless for this debt. She failed to make the payments and the vehicle was repossessed in 2012.⁸

SOR ¶ 1.e – past-due account for \$894 with a balance of \$1,606. This was a personal loan that was at least 60 days past due and had a date of last activity of September 2013. In his Answer to the SOR, Applicant provided a receipt showing this debt was paid on August 22, 2014.⁹

SOR ¶ 1.f – collection account for \$491. This was a cable television account that had a date of last activity of February 2014. In his Answer to the SOR, Applicant provided a document showing the original account had a zero balance as of August 2014. This debt was apparently paid on May 1, 2013.¹⁰

SOR ¶ 1.g – collection account for \$760. This was a child-support arrearage that had a date of last activity of February 2014. Applicant and his ex-wife share joint custody of their daughter. In general, each has custody of their daughter every other week. Under this arrangement, his child support obligation consists of paying \$10 per week for his daughter's health insurance. His pay is garnished for those child support payments. In his post-hearing submission, he provided a receipt from the state's child support enforcement service dated November 17, 2014, showing he is up to date on his child support payments.¹¹

Applicant testified that his annual salary in his new job is about \$40,000. This job provides him the opportunity to work a significant amount of overtime. Taking into consideration his overtime earnings, his annual income is between \$60,000 and \$70,000. He testified that, besides the tax debt, he had no other delinquent debts. His only other debts are a mortgage loan and truck loan, both of which are in good standing. He estimated that his net monthly remainder was about \$800 to \$900. At the time of the hearing, he had about \$2,500 in a checking account and about \$5,000 in a 401(k)

⁷ Tr. 48-51, 61-79; AE F, G, I, N, O, P; Applicant's Answer to the SOR. On the IRS Form 9465, Applicant was supposed to enter the total amount owed as shown on his tax returns or notices.

⁸ Tr. 55-56; GE 1, 2, 3; Applicant's Answer to the SOR, Attachment B.

⁹ Tr. 56-57; GE 2, 3; Applicant's Answer to the SOR, Attachment C.

¹⁰ Tr. 57-59; GE 2, 3; Applicant's Answer to the SOR, Attachment D.

¹¹ Tr. 50-52, 59-61; GE 2, 3; AE K; Applicant's Answer to the SOR.

account. His mother resides with him. He has been supporting her since she lost her job in March 2013.¹²

Applicant's probationary employment appraisal for his new job indicated that he met all standards, had an excellent work ethic, and was a welcomed addition to the workforce. He was highly recommended for a permanent position. A former employer stated that Applicant was very responsible and dedicated employee. A longtime friend described Applicant as a man of integrity who was extremely dedicated to his family.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 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, to reach his 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

¹² Tr. 54-55; AE G, I, J, L.

¹³ AE C, D, E.

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. Two are potentially applicable in this case:

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

Applicant accumulated delinquent debts that he was unable to satisfy for an extended period. This evidence is sufficient to raise the above disqualifying 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.

Applicant's financial problems are ongoing. From the evidence presented, I cannot find that those problems are unlikely to recur and do not cast doubt on his current reliability, trustworthiness, and good judgment. AG 20(a) does not apply.

In about 2011, Applicant's business failed due to a downturn in the economy. Following the failure of his business, he encountered periods of unemployment and underemployment. He also went through a divorce. Those events were conditions beyond his control that contributed to his financial problems. Nevertheless, his tax problems were the result of him failing to allocate a sufficient portion of his income to his taxes. He only merits partial credit under AG ¶ 20(b).

Applicant has resolved the debts in SOR ¶¶ 1.e, 1.f, and 1.g. One of those debts (SOR ¶ 1.e) was resolved after issuance of the SOR. AG ¶ 20(d) applies to the resolved debts.

The total amount of Applicant's past-due tax debt is unclear, but appears to be at least \$37,000. After issuance of the SOR, he submitted to the IRS a proposed installment payment agreement to resolve his unpaid taxes. The proposed installment plan is for tax years 2008 through 2012, but does not indicate the amount of past-due taxes owed. It is unknown whether the IRS accepted the proposed payment plan. He submitted check stubs showing that he made four \$200 monthly payments under the proposed agreement. Those payments are about a quarter of his net monthly

remainder. From the evidence presented, It would appear that he could be paying more monthly toward this indebtedness. His payments under the proposed agreement merit partial credit under AG ¶¶ 20(c) and 20(d).

Applicant established that his wife is responsible under a divorce decree for the debt in SOR ¶ 1.d and that she had agreed to hold him harmless for that debt. AG ¶ 20(e) applies to the debt in SOR ¶ 1.d.

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.

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. AG ¶ 2(c).

I considered the potentially disqualifying and mitigating conditions in light of all relevant facts and circumstances surrounding this case. I have incorporated my comments under Guideline F in my whole-person analysis. Some of the factors in AG ¶ 2(a) were addressed under that guideline, but some warrant additional comment.

Applicant is a valued employee. He has been recommended for a permanent position in his current company. He resolved three of his debts and recently took steps towards addressing his large past-due tax debt. Nevertheless, his recent efforts have failed to fully mitigate the security concerns arising from his past-due taxes. His statements in his e-QIP and during the OPM interview that indicated his tax debt was resolved are troubling. His explanation for the existence of those incorrect statements was less than convincing.

Overall, the record evidence leaves me with questions and doubts about Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude that Applicant failed to mitigate the financial considerations security concerns.

Formal Findings

Formal findings 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
Subparagraph 1.a:	For Applicant
Subparagraph 1.b:	Against Applicant
Subparagraphs 1.c -1.g:	For 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 a security clearance. Eligibility for access to classified information is denied.

James F. Duffy
Administrative Judge