



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



In the matter of:)
)
XXXXXXXXXX, XXXXX) ISCR Case No. 14-00964
)
Applicant for Security Clearance)

Appearances

For Government: Chris Morin, Esq., Department Counsel
For Applicant: *Pro se*

10/08/2014

Decision

TUIDER, Robert J., Administrative Judge:

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

Statement of the Case

On August 5, 2013, Applicant submitted an Electronic Questionnaire for Investigations Processing (e-QIP) or security clearance application (SF 86). On April 25, 2014, the Department of Defense (DOD) Consolidated Adjudications Facility (CAF) issued an SOR to Applicant, pursuant to 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) promulgated by the President on December 29, 2005.

The SOR alleged security concerns under Guideline F (financial considerations). The SOR detailed reasons why the DOD CAF was unable to find

that it is clearly consistent with the national interest to continue a security clearance for Applicant, and it recommended that his case be submitted to an administrative judge for a determination whether his clearance should be continued or revoked.

On May 8, 2014, Applicant responded to the SOR. On July 18, 2014, Department Counsel was ready to proceed on Applicant's case. On that same day, DOHA assigned Applicant's case to me. On July 30, 2014, the Defense Office of Hearings and Appeals (DOHA) issued a hearing notice, setting the hearing for August 26, 2014. Applicant's hearing was held as scheduled. At the hearing, Department Counsel offered Government Exhibits (GE) 1 through 4 and Hearing Exhibit (HE) I, which were received into evidence without objection. Applicant did not call any witnesses, testified, and offered Applicant Exhibits (AE) 1 through 11, which were received into evidence without objection. On September 5, 2014, DOHA received the hearing transcript (Tr.).

Findings of Fact

Applicant denied SOR ¶¶ 1.a and 1.b, and admitted 1.c and 1.d with explanations. After a thorough review of the record, I make the following findings of fact.

Background Information

Applicant is a 55-year-old technical trainer, who has worked for a defense contractor since December 2007. He has held a security clearance since he enlisted in the U.S. Army in 1979, except for a few brief periods following his retirement from the Army in 2003, discussed *infra*. (Tr. 20-25, GE 1.)

Applicant graduated from high school in June 1977. He was awarded an associate's degree in business administration in November 2010. Additionally, Applicant attended "a number of Army schools" when he was on active duty. (Tr. 25-27, GE 1.) Applicant served in the Army from August 1979 to August 2003, a period of 24 years, and was honorably discharged as a sergeant first class (pay grade E-7). His DD-214 lists two military occupational specialties – 93C40 Q8 air traffic control operator – 18 years, 10 months; and 31C40 00 single channel radio operator – 21 years, 11 months. (Tr. 27-28, GE 1, AE 7, AE 9.)

Applicant married in September 1981, and has two children – a 21-year-old daughter and a 10-year-old son. Applicant's daughter is attending college and is financially dependent on him for support. Applicant's wife works part-time as an event planner and also sells women's cosmetics. In addition to those two part-

time jobs, she has recently been working part-time as an administrative assistant at their church. (Tr. 29-33, GE 1.)

Financial Considerations

The SOR alleges four separate allegations: (1) that Applicant failed to file his federal tax returns for six consecutive years from 2007 through 2012; (2) that he failed to file his state tax returns for nine consecutive years from 2004 through 2012; (3) an unpaid judgment for \$1,178 in 2009; and (4) a \$2,686 collection account.

During his hearing, Applicant attributed his financial problems to periods of unemployment (September 2006; December 2006 to June 2007; September 2007 to December 2007) or underemployment following his retirement from the Army in 2003. During this time, his wife's job selling women's cosmetics "started to drop off a little bit." His income stream stabilized in 2007 when he began his current job. (Tr. 33-35.) During his Office of Personnel Management Personal Subject Interview (OPM PSI) on September 5, 2013, Applicant stated that he could not pay his 2007 federal or state income taxes because he was unemployed for part of the year and his wife's business was on the downswing, and his priority was providing food, clothing, and housing for his family. (GE 2.)

Applicant also stated during his September 2013 OPM PSI that he had retained a tax accountant to resolve his federal and state tax issues. (GE 2.) During that OPM PSI, he was also confronted about the \$1,178 unpaid judgment debt. Applicant explained that judgment was a credit card debt that he thought his wife was paying and was "an isolated incident due to a miscommunication with his spouse." He also stated in that OPM PSI that he was making \$125 to \$150 monthly payments on that account and would continue to do so until it was paid off. (GE 2.)

Applicant became a legal resident of the state in which he retired in 2003 and has remained there ever since. (Tr. 39.) Federal and state taxes, as appropriate, were deducted from his pay while he was on active duty and afterwards. Applicant had prepared and filed his tax returns up to the point he stopped doing so after he retired from the Army. (Tr. 39-40.) He acknowledged that he had a legal obligation to file his tax returns. Applicant stated he had, "a lot of bills and responsibilities to clear up," "got scared," and was "taking care of my family, trying to build my life back up, that's what happened. I don't know if that's a good excuse or not, but that's what I have for you." Had he known then what he knows now, he would have taken a different approach. (Tr. 41-42, 72-73, 77-78.)

Applicant added that when he calculated his federal taxes for 2007 and the out years, he thought he owed more money than he was able to pay, “money that would have had a great impact on my family.” Applicant, believing that he owed money to the federal and state tax authorities, chose not to file his tax returns. (Tr. 42-43.) Applicant did not consider discussing his tax situation with a tax expert or the Internal Revenue Service (IRS), nor did he consider adjusting his withholding taxes. Applicant ultimately contacted a tax consultant and filed his federal and state returns in late 2013 for the years 2007 to 2012. His tax consultant was unable to file his state returns for 2004 to 2007 because she was unable to “go back [that] far.” Applicant denied that the filing of his tax returns was as a result of completing his e-QIP in August 2013. He stated that he and his wife had contacted their tax preparer before the security clearance application process had begun. (SOR answer, Tr. 47-48, 71-72, AE 1.)

Applicant has not resolved the \$1,178 September 2009 judgment against him. He claims to have made three or four \$125 to \$150 payments to the law firm representing the creditor before judgment was entered against him. This debt remains unresolved. (SOR ¶ 1.c, Tr. 55-58.) Applicant is attempting to resolve the \$2,686 collection account. He claimed he contacted the creditor to clarify whether it was a “student loan” or a “regular loan.” Applicant provided a memorandum for the record stating that he had recently contacted the creditor (around time of hearing) and set up a payment plan with the first payment due on September 15, 2014, approximately two weeks after his hearing. Apart from Applicant’s memorandum, he did not provide any documentation of a payment or payments. This recent activity attempting to resolve a long-overdue debt does not show good-faith nor does it suggest this debt is resolved. (SOR ¶ 1.d, Tr. 58-61, AE 2.)

Applicant’s annual salary is \$68,835, and his Army retirement is approximately \$21,000 per year. After all his bills are paid, Applicant estimated that he has a net monthly remainder of “say \$600.” (Tr. 35, 60-63, AE 4.) Applicant’s “game plan” to resolve the debts in SOR ¶¶ 1.c and 1.d is to go to the court and “work out something” on 1.c and keep making payments on 1.d. (Tr. 63-64.) Applicant has not sought financial counseling. (Tr. 65.) Applicant has filed all of his late federal and state tax returns to the extent allowed, and ironically received a refund for each year from the federal and state tax authorities. He added that his 2012 federal refund check was stolen and he has filed a claim for a replacement check. (Tr. 65-69.) During Applicant’s 24 years of Army service, he testified that he never failed to file his taxes. (Tr. 69-70.)

In short, Applicant has filed his state and federal tax returns as required. He has not provided any primary source mitigating documentation for the 2009 \$1,178 judgment or the \$2,686 collection account. Both accounts have been in a delinquent status for several years.

Character Evidence

Applicant submitted numerous favorable reference letters from professional and personal sources. Applicant also submitted performance evaluations from his current employer as well as numerous awards and certificates. The collective sense of these documents is very favorable as pertaining to his character, work performance, and accomplishments. The individuals who submitted letters, perhaps apart from his wife, were unaware that Applicant intentionally failed to file his federal and state tax returns. (Tr. 82-83, AE 8 – AE 11.)

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 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.

Applicant failed to file his state tax returns from 2004 through 2012 and failed to file his federal tax returns from 2007 through 2012. He also has two outstanding debts that have been in *arrears* for several years.

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 delinquent debt is documented in his credit reports and in his OPM interview.

The evidence establishes the disqualifying conditions in AG ¶¶ 19(a), 19(c), and 19(g) requiring additional inquiry about the possible applicability of mitigating conditions.

Five 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;

(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 conduct does not warrant application of AG ¶ 20(a) because there is more than one delinquent debt and his financial problems are not isolated. His debt is a "continuing course of conduct" under the Appeal Board's jurisprudence. See ISCR Case No. 07-11814 at 3 (App. Bd. Aug. 29, 2008) (citing ISCR Case No. 01-03695 (App. Bd. Oct. 16, 2002)).

Furthermore, the evidence does not warrant application of AG ¶ 20(b). Applicant's explanation for failing to file his state and federal tax returns and his lack of progress in resolving his two SOR debts does constitute circumstances beyond his control. Applicant had filed his tax returns for many years up until the time he chose not to do so following his retirement from the Army. For reasons that are unclear, he did not consult with outside expertise. Had he done so, he would have received refunds for each of the years he failed to file his state and federal tax returns. Applicant's efforts to resolve his two SOR debts are equally disappointing. There is insufficient evidence that Applicant remained in contact with his creditors or tried to resolve those two debts.¹

AG ¶ 20(c) is not applicable because Applicant did not seek or receive financial counseling. Applicant's subsequent filing of his state and federal tax returns warrants partial credit under AG ¶ 20(d).² However, his efforts to resolve

¹"Even if Applicant's financial difficulties initially arose, in whole or in part, due to circumstances outside his [or her] control, the Judge could still consider whether Applicant has since acted in a reasonable manner when dealing with those financial difficulties." ISCR Case No. 05-11366 at 4 n.9 (App. Bd. Jan. 12, 2007) (citing ISCR Case No. 99-0462 at 4 (App. Bd. May 25, 2000); ISCR Case No. 99-0012 at 4 (App. Bd. Dec. 1, 1999); ISCR Case No. 03-13096 at 4 (App. Bd. Nov. 29, 2005)). A component is whether he maintained contact with his creditors and attempted to negotiate partial payments to keep his debts current.

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)).

his two SOR debts have been disappointing. His 2009 judgment has been lingering and remains unresolved and his recent attempt to resolve his long overdue collection account just before his hearing date does not constitute good-faith. AG ¶ 20(e) is not relevant.

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.

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). The discussion in the Analysis section under Guideline F is incorporated in this whole-person section. However, further comments are warranted.

Applicant's 24 years of honorable Army service, reference letters and certificates, and record of employment with his defense contractor employer weigh in his favor. He is a law-abiding citizen and a productive member of society. There is no evidence to suggest that he is not current on his day-to-day expenses.

However, it is troubling to encounter someone with Applicant's background as a former senior Army non-commissioned officer who knew of his legal obligation to file his state and federal tax returns and failed to do so – not for one or two years, but for six consecutive years for his federal tax returns and nine consecutive years for his state tax returns. Additionally troubling is his failure to address two relatively small lingering debts. Unfortunately, these concerns, taken as a whole, leave me with doubts regarding Applicant's security worthiness. After weighing the disqualifying and mitigating conditions, and all the facts and circumstances in the context of the whole-person, I conclude he has not mitigated the financial considerations security concerns.

