



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



In the matter of:)
)
[name redacted]) ISCR Case No. 14-06848
)
Applicant for Security Clearance)

Appearances

For Government: Daniel F. Crowley, Esq., Department Counsel
For Applicant: *Pro se*

04/25/2016

Decision

HARVEY, Mark, Administrative Judge:

Applicant did not include income received from his father’s construction company for work he performed on his federal income tax returns for 2004 through 2011. He did not provide amended federal income tax returns for 2004 through 2011, or establish that filing those eight amended tax returns was not required. Financial considerations security concerns are not mitigated. Access to classified information is denied.

History of the Case

On March 10, 2014, Applicant completed and signed an Electronic Questionnaire for National Security Positions (e-QIP) (SF 86). (Item 3) On August 1, 2015, the Department of Defense (DOD) Consolidated Adjudications Facility (CAF) issued Applicant a statement of reasons (SOR) pursuant to Executive Order (Exec. Or.) 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 detailed reasons why the DOD CAF did not find that it is clearly consistent with the national interest to grant or continue a security clearance for him, and recommended referral to an administrative judge to determine whether a clearance should be granted, continued, denied, or revoked. Specifically, the SOR set forth security concerns arising under the financial considerations guideline.

On August 14, 2015, Applicant provided a response to the SOR, and he requested a decision without a hearing. (Item 2) On November 16, 2015, Department Counsel completed the File of Relevant Material (FORM). On November 25, 2015, Applicant received the FORM. Applicant did not respond to the FORM. The Government's case consisted of six exhibits. (Items 1-6) On April 4, 2016, the case was assigned to me.

Findings of Fact¹

In Applicant's SOR response, he admitted all of the SOR allegations. (Item 2) He also provided extenuating and mitigating information. Applicant's admissions are accepted as findings of fact.

Applicant is a 31-year-old supply technician employed by a defense contractor since January 2014.² From January 2013 to December 2013, he worked in retail sales. From July 2011 to December 2013, he worked in customer service. From January 2004 to June 2011, he worked for his father in construction. In 2006, he received a general educational development (GED) certificate. He attended a community college for two years and received two certificates. He has never served in the military. He has never married, and he does not have any children. There is no evidence of security violations or disciplinary actions by his employer.

Financial Considerations

Applicant's history of delinquent debt is documented in his credit reports, SF 86, and SOR response. His SOR alleges: three delinquent debts totaling \$2,307, and three repossessed vehicles from 2005 to the present. On August 25, 2015, the creditor for the debt in SOR ¶ 1.a for \$1,593 wrote that the debt was settled in full. (Item 2) An August 9, 2015 credit report for the debt in SOR ¶ 1.b for \$357 shows the account is in "pays as agreed" status. (Item 2) Applicant believes the debt in SOR ¶ 1.c for \$357 is a duplicate of the debt in SOR ¶ 1.b. (Item 2)

Applicant had vehicles repossessed in 2005, 2007, and 2013 because he could not afford the monthly payments. (SOR ¶ 1.e; Item 5) The SOR did not allege a delinquent debt owed to the creditors as a result of the vehicle repossessions. None of his credit reports show a balance owed for vehicle repossessions. (Items 5, 6)

Applicant's SOR also alleges, and his Office of Personnel Management (OPM) personal subject interview (PSI) indicates Applicant worked for his father from 2004 to 2011, and he did not declare the income received from his father on his federal income tax returns. (Item 5) Applicant did not know how much his father paid him for those years. (Item 5)

¹Some details have been excluded in order to protect Applicant's right to privacy. Specific information is available in the cited exhibits.

²Unless stated otherwise, the source for the information in this paragraph and the next paragraph is Applicant's March 10, 2014 Electronic Questionnaire for National Security Positions (e-QIP) (SF 86). (Item 3)

On September 26, 2012, Applicant signed an agreement with a credit repair company. His credit repair company was supposed to address his delinquent debts. (Items 2, 5) The credit repair company paid the debt in SOR ¶ 1.a. (Item 2) On August 25, 2015, the credit repair company wrote that all negative accounts on his credit report had been successfully resolved. (Item 2) The failure to file accurate federal tax returns from 2004 to 2011 is more problematic. In his SOR response, Applicant said:

I admit that I did not file reportable income on my annual federal tax returns from 2004 through 2011 for [income received from my father] because I had been told if the amount is not enough I did not have to report the amount of income. In the report I also posted the times working for [my father] were an estimate and my mistake was checking off full time when it was really part time; honestly it was only when he needed a person so perhaps even be considered seasonal (once a week or just a weekend a month). Some may even consider I was learning a trade and my father said it would build character. However, I did file [] federal tax returns for other jobs I did not list on my report due to lack of not recalling my work history that far back for those years. Attached are income tax statements, some of which I obtained from the local IRS office. (Item 2)

Applicant provided tax records which are summarized in the table below:³

Tax Return	Date Filed	Wages	Adjusted Gross Income	Tax Withheld	Tax Due	Refund
2006	Aug. 25, 2015	\$981	\$981	\$77	0	\$77
2007	Unknown					
2008	Unknown					
2009	May 17, 2010	\$1,788	\$4,483	\$510	\$410	\$100
2010	Unknown	\$454	\$454	\$1,065 ⁴	0	\$1,065
2011	Apr. 11, 2012	\$4,271	\$4,271	\$1,521	0	\$1,521

Applicant provided IRS W2 printouts indicating: 2005—\$1,612 income from a car wash; and 2006—\$981 from a staffing agency. (Item 2) The IRS reported no tax returns on file for tax years 2012 to 2014. (Item 2)⁵ His March 10, 2014 SF 86 asks whether

³The source for all of the information in this paragraph is Applicant SOR response, which included numerous documents. (Item 2)

⁴\$1,000 of the \$1,065 is actually a credit on line 66 of his IRS Form 1040 for the “American opportunity credit.”

⁵Applicant’s SOR does not allege that he failed to file federal income tax returns or that he failed to disclose his federal income tax issues on his March 10, 2014 SF 86. In ISCR Case No. 03-20327 at 4 (App. Bd. Oct. 26, 2006), the Appeal Board listed five circumstances in which conduct not alleged in an SOR may be considered stating:

- (a) to assess an applicant’s credibility; (b) to evaluate an applicant’s evidence of extenuation, mitigation, or changed circumstances; (c) to consider whether an applicant has demonstrated successful rehabilitation; (d) to decide whether a particular provision of

Applicant failed to file or pay his federal income taxes for the last seven years when required by law, and Applicant answered, “No.” (Item 3) He provided IRS W2s for 2009, 2010, and 2011; however, none were from his father’s construction firm. (Item 2)

There is no evidence that Applicant went to his father to ask how much income he was paid over the years 2004 to 2011 or that he made any effort to estimate the amount of income he received over those years. He would then be required to amend his federal income tax returns if his income exceeded the published Internal Revenue Service (IRS) thresholds for gross income. Those thresholds for a single person under age 65 for 2004 through 2011 are as follows: for 2004—\$7,950;⁶ for 2005—\$8,200;⁷ for 2006—\$ 8,450;⁸ for 2007—\$8,750;⁹ for 2008—\$8,950;¹⁰ for 2009—\$9,350;¹¹ for 2010—\$9,350;¹² and for 2011—\$9,500.¹³ Of course these thresholds do not apply if a person is a student and is taken as a dependent on their parent’s federal income tax return. A careful review of federal tax rules to insure proper filing and payment of taxes is necessary. There is no evidence that Applicant filed amended federal income tax returns.

the Adjudicative Guidelines is applicable; or (e) to provide evidence for whole person analysis under Directive Section 6.3.

Id. (citing ISCR Case No. 02-07218 at 3 (App. Bd. Mar. 15, 2004); ISCR Case No. 00-0633 at 3 (App. Bd. Oct. 24, 2003)). See also ISCR Case No. 12-09719 at 3 (App. Bd. April 6, 2016) (citing ISCR Case No. 14-00151 at 3, n. 1 (App. Bd. Sept. 12, 2014); ISCR Case No. 03-20327 at 4 (App. Bd. Oct. 26, 2006)). Consideration of the possibility that Applicant failed to file or timely file his federal income tax returns, or that he failed to disclose his federal tax issues on his March 10, 2014 SF 86 will not be considered except for the five purposes listed above.

⁶2004 Internal Revenue Service (IRS) Form 1040 Instructions at page 12, <https://www.irs.gov/pub/irs-prior/i1040--2004.pdf>.

⁷2005 IRS Form 1040 Instructions at page 12, <https://www.irs.gov/pub/irs-prior/i1040--2005.pdf>.

⁸2006 IRS Publication (Pub.) 17, “Your Federal Income Tax For Individuals” at page 5, <https://www.irs.gov/pub/irs-prior/p17--2006.pdf>.

⁹2007 IRS Pub. 17, “Your Federal Income Tax For Individuals” at page 5, <https://www.irs.gov/pub/irs-prior/p17--2007.pdf>.

¹⁰2008 IRS Pub. 17, “Your Federal Income Tax For Individuals” at page 5, <https://www.irs.gov/pub/irs-prior/p17--2008.pdf>.

¹¹2009 IRS Pub. 501, “Exemptions, Standard Deduction, and Filing Information” at page 3, <https://www.irs.gov/pub/irs-prior/p501--2009.pdf>.

¹²2010 IRS Form 1040 Instructions, at page 8, <https://www.irs.gov/pub/irs-prior/i1040gi--2010.pdf>.

¹³2011 IRS Pub. 17, “Your Federal Income Tax” at page 4, <https://www.irs.gov/pub/irs-prior/p17--2011.pdf>.

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 revised 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. Thus, nothing in this decision should be construed to suggest that it is based, 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 [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

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.

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.” Applicant’s history of delinquent debt is documented in his credit reports, SF 86, and SOR response. Applicant’s SOR alleges, and the evidence establishes Applicant had two delinquent debts (one debt was a duplication), and three vehicles were repossessed. He failed to declare all of his income on his income tax returns as required by federal law. The Government established 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;¹⁴ 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.

The Appeal Board concisely explained Applicant's responsibility for proving the applicability of mitigating conditions as follows:

Once a concern arises regarding an Applicant's security clearance eligibility, there is a strong presumption against the grant or maintenance of a security clearance. See *Dorfmont v. Brown*, 913 F. 2d 1399, 1401 (9th Cir. 1990), *cert. denied*, 499 U.S. 905 (1991). After the Government presents evidence raising security concerns, the burden shifts to the applicant to rebut or mitigate those concerns. See Directive ¶ E3.1.15. The standard applicable in security clearance decisions is that articulated in *Egan, supra*. "Any doubt concerning personnel being considered for access to classified information will be resolved in favor of the national security." Directive, Enclosure 2 ¶ 2(b).

ISCR Case No. 10-04641 at 4 (App. Bd. Sept. 24, 2013).

Applicant's conduct in resolving his delinquent debt does not warrant full application of any mitigating conditions to all of the SOR allegations; however, he presented some important mitigating information. Applicant is credited with resolving all of his delinquent SOR debts. There is no evidence that his repossessed vehicles resulted in delinquent debts.

Applicant's failure to ensure he timely and accurately filed his tax returns and fully paid his taxes raises a significant security concern. For tax years 2004 through 2011, Applicant said he did not declare the income he received from his father's

¹⁴The 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)).

construction company on his federal income tax returns.¹⁵ The SOR informed him that this failure raised a security concern. In his response to the SOR, he did not provide evidence of income received from his father for construction work Applicant provided for those eight years. When an issue of delinquent taxes is involved, an administrative judge is required to consider how long the applicant waits after a tax debt arises to begin making payments and whether payments begin before or after a tax lien or levy is filed.¹⁶ It is unknown whether Applicant actually owes any federal income taxes because he did not provide his gross income after including income received from his father's company for tax years 2004 through 2011. Applicant has the burden of persuasion here. Applicant's failure to resolve the ambiguity in his federal tax situation weighs against mitigating Guideline F concerns. There is insufficient assurance that his tax problems are being resolved, are under control, and will not recur in the future. Under all the circumstances, he failed to meet his burden to establish that financial considerations security concerns are mitigated.

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.

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 have incorporated my comments

¹⁵See ISCR Case No. 14-03358 at 3, 5 (App. Bd. Oct. 9, 2015) (reversing grant of a security clearance, noting \$150,000 owed to the federal government, and stating "A security clearance represents an obligation to the Federal Government for the protection of national secrets. Accordingly failure to honor other obligations to the Government has a direct bearing on an applicant's reliability, trustworthiness, and ability to protect classified information.").

¹⁶See ISCR Case No. 14-01894 at 2-6 (App. Bd. Aug. 18, 2015) (reversing grant of a security clearance, discussing lack of detailed corroboration of circumstances beyond applicant's control adversely affecting finances, noting two tax liens totaling \$175,000 and garnishment of Applicant's wages, and emphasizing the applicant's failure to timely file and pay taxes); ISCR Case No. 12-05053 at 4 (App. Bd. Oct. 30, 2014) (reversing grant of a security clearance, noting not all tax returns filed, and insufficient discussion of Applicant's efforts to resolve tax liens). See also ISCR Case No. 14-05476 (App. Bd. Mar. 25, 2016) (reversing grant of a security clearance despite filing all tax returns and paying all taxes because taxes were not timely paid and filed and emphasizing ambiguities in the evidence applicant submitted as not meeting applicant's evidentiary burden).

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 31-year-old supply technician employed by a defense contractor since January 2014. From January 2004 to June 2011, he worked part time for his father in construction. In 2006, he received a GED certificate. He attended a community college for two years and received two certificates. There is no evidence of security violations or disciplinary actions by his employer.

The financial evidence against approval of Applicant's clearance is more substantial at this time. Applicant disclosed that from 2004 through 2011 he received income from his father, and he did not declare this income on his federal income tax returns. On August 1, 2015, the SOR was issued, and it notified Applicant that his disclosure about not declaring all of his income on his 2004 through 2011 federal income tax returns raised a security concern. Applicant did not indicate how much income he received from his father for each of those years, and it was not possible to assess whether his income was above or below the IRS thresholds for requiring him to file a federal tax return. Applicant did not meet his burden of persuasion. The evidence of record shows lack of financial responsibility and judgment and raises unmitigated questions about Applicant's reliability, trustworthiness, and ability to protect classified information. See AG ¶ 18. More information about Applicant's income for 2004 through 2011, and if his gross income exceeded IRS thresholds, proof that he declared that income and paid his federal income taxes, is necessary to mitigate security concerns.

It is well settled that once a concern arises regarding an applicant's security clearance eligibility, there is a strong presumption against the grant or renewal of a security clearance. See *Dorfmont*, 913 F. 2d at 1401. Unmitigated financial considerations concerns lead me to conclude that grant of a security clearance to Applicant is not warranted at this time. This decision should not be construed as a determination that Applicant cannot or will not attain the state of reform necessary for award of a security clearance in the future. With more effort towards documented resolution of his past-due debts, and a track record of behavior consistent with his obligations, he may well be able to demonstrate persuasive evidence of his security clearance worthiness.

I have carefully applied the law, as set forth in *Egan*, Exec. Or. 10865, the Directive, and the AGs, to the facts and circumstances in the context of the whole person. I conclude that financial consideration concerns are not mitigated, and it is not clearly consistent with the national interest to grant Applicant security clearance eligibility at this time. Financial considerations concerns are not mitigated.

Formal Findings

Formal findings For or Against Applicant 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
Subparagraphs 1.a through 1.c:	For Applicant
Subparagraph 1.d:	Against Applicant
Subparagraph 1.e:	For 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.

MARK HARVEY
Administrative Judge