



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



In the matter of:

Applicant for Security Clearance

)  
)  
)  
)  
)

ISCR Case No. 15-01286

**Appearances**

For Government: Tara Karoian, Esq., Department Counsel

For Applicant: *Pro se*

04/27/2016

**Decision**

DUFFY, James F., Administrative Judge:

Applicant mitigated the security concerns under Guideline F, financial considerations. Eligibility for access to classified information is granted.

**Statement of the Case**

On August 22, 2015, the Department of Defense Consolidated Adjudications Facility (DOD CAF) issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guideline F. DOD CAF took that action 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 continue Applicant's security clearance. On September 14, 2015, Applicant

answered the SOR and requested a hearing. On October 30, 2015, the case was assigned to me. On November 19, 2015, the Defense Office of Hearings and Appeals (DOHA) issued a Notice of Hearing scheduling the hearing for December 8, 2015. The hearing was held as scheduled.

At the hearing, Department Counsel offered Government Exhibits (GE) 1 and 2. Applicant testified, called a witness, and offered Applicant Exhibits (AE) A through M. The record of the proceeding was left open until January 5, 2016, to provide Applicant an opportunity to present additional matters. Additional extensions to keep the record open were granted. The record closed on April 22, 2016. All exhibits were admitted into evidence without objection. The transcript (Tr.) of the hearing was received on December 16, 2015.

### **Findings of Fact**

Applicant is a 36-year-old heavy equipment mechanic who works for a defense contractor. He has been working for his current employer since February 2012. He graduated from high school in 1999. He served on active duty in the U.S. Marine Corps (USMC) from 1999 to 2004, attained the grade of corporal (E-4), and received an honorable discharge. He transitioned to the inactive USMC Reserve for three years. He has never been married and has no children. He was granted eligibility for a security clearance in October 2011.<sup>1</sup>

The SOR alleged that Applicant failed to file his federal and state income tax returns for tax years 2009 and 2010 as required and failed to pay taxes that were due for those years (SOR ¶¶ 1.a and 1.b). The SOR further alleged that he owed \$17,027 to the Federal Government for 2009 and 2010, and \$23,000 to the state government for those years (SOR ¶¶ 1.c and 1.d). In his Answer to the SOR, Applicant neither admitted nor denied the allegations, but commented on some of the allegations.<sup>2</sup>

In his Electronic Questionnaire for Investigations Processing (e-QIP) dated April 3, 2012, Applicant disclosed that he failed to file his 2009 and 2010 federal and state income tax returns and failed to pay his federal and state income taxes for those years. He attributed these delinquencies to family financial difficulties in 2009 and to losing his job in 2010. He estimated that he owed the federal and state taxing authorities \$20,000 for 2009 and \$10,000 for 2010. He indicated that he was willing to correct these issues and was seeking the assistance of a tax attorney. His e-QIP also reflected that, since his discharge from the USMC in 2004, he was unemployed on three occasions: from

---

<sup>1</sup> Tr. 6-7, 72-76; GE 1, 2.

<sup>2</sup> Applicant's Answer to the SOR.

June 2010 to September 2010, November 2010 to June 2011, and November 2011 to February 2012.<sup>3</sup>

In an Office of Personnel Management (OPM) interview in November 2012, Applicant stated that he failed to file his 2010 federal and state income tax returns because his family moved and he could not find the necessary paperwork. He stated that he filed the tax returns in mid-2012, and owed approximately \$16,000 to the Internal Revenue Service (IRS) and approximately \$23,000 to the state. The amount owed to the state was based on a letter he received from the state before he filed his state income tax returns for those years. He also stated he was still trying to obtain the assistance of a tax attorney.<sup>4</sup>

In his Answer to the SOR, Applicant indicated that he owed \$43,666 to the Federal Government for 2009 and 2010 and he was attempting to resolve that matter. He also stated that he filed his state income tax returns for 2009 and 2010 and received refunds for those years.<sup>5</sup>

In 2012, Applicant was working in Afghanistan. He gave his father a power of attorney that authorized his father to file his income tax returns. His father hired a tax solutions agency to file the delinquent tax returns. Applicant's 2009 and 2010 federal income tax returns were filed on September 15 and 16, 2012. After filing those tax returns, he knew that he owed the IRS past-due taxes and started a repayment plan. Under that repayment plan, he paid about \$350 per month from March 2013 to August 2013. He stopped making the payments when his tax preparer advised him to do so. The tax preparer apparently intended to challenge the amount owed, but never did so. The tax solutions agency later went out of business and Applicant's tax records were transferred to another tax solutions agency.<sup>6</sup>

In January 2015, Applicant hired a tax attorney to assist him in resolving his tax problems. The tax attorney testified at the hearing. In January 2015, the tax attorney wrote a letter to the tax solution agency holding Applicant's 2009 and 2010 tax records requesting those records be sent to her. She encountered a number of delays in obtaining those records and received them on November 18, 2015, which was less than a month before the hearing.<sup>7</sup>

---

<sup>3</sup> Tr. 48-50; GE 1, 2. At the hearing Applicant testified that his family difficulties involved his father and brother being evicted from a rental property when the landlord's property was apparently foreclosed. See Tr. 49-50, 74.

<sup>4</sup> Tr. 64-65; GE 2.

<sup>5</sup> Applicant's Answer to the SOR.

<sup>6</sup> Tr. 23-25, 29-32, 41-43, 58-64, 70; AE A, I, L, M. In addition to the repayment plan, the IRS also withheld Applicant's tax refunds for subsequent years.

<sup>7</sup> Tr. 23-26, 28-37, 40-42; AE A, C-F, H, M.

Upon receipt of the tax records, the tax attorney determined that they were not as helpful as she had hoped. She contacted the IRS on numerous occasions concerning Applicant's tax problems. She obtained IRS account transcripts for the years in question. She also contacted the state income tax authorities who confirmed that Applicant filed his state income taxes for 2009 and 2010 and that he received refunds for those years. Because the state tax authority would not provide her with documentation confirming receipt of the tax returns, she submitted a request for copies of those state tax returns in November 2015. By the time the record closed, the tax attorney still had not received the state income tax returns. Nonetheless, the tax attorney's testimony established that Applicant's state tax problems have been resolved.<sup>8</sup>

The tax attorney testified that, based on her review of Applicant tax records, she believed his former employer may have inaccurately reported his income for 2009. He was issued two W-2 Wage and Tax Statements from the same employer for 2009. She indicated receiving two W-2s from the same employer in a given year was not unprecedented, but was unusual. The total of his reported income on the two W-2s was \$170,157. The tax attorney thought one of the W-2s reflected nontaxable per diem that he received while working in Kuwait in 2009 and was mistakenly treated as taxable income for that year. If her suspicion was correct, Applicant's taxable income for 2009 would have been significantly less than what was previously reported to the IRS. She believed that he might not owe any past-due federal income taxes for 2009. At the time of the hearing, the tax attorney was continuing to seek information from Applicant's former employer and the IRS to resolve this issue. In September 2015, she also submitted a request for an IRS hearing to address his tax problems.<sup>9</sup>

In a post-hearing submission dated January 5, 2016, the tax attorney provided an email from Applicant's former employer explaining he was issued two W-2s for 2009 because the company moved the payroll function to a different location that year and the W-2s correctly reflected his taxable income for that year. Based on this development, the tax attorney acknowledged that her previous suspicion about the W-2s was unfounded and noted that Applicant would likely pursue an offer in compromise to address the federal tax debt. Extensions were granted to keep the record of the proceeding open until February 5, 2016, and then to March 7, 2016.<sup>10</sup>

On March 3, 2016, Applicant and the tax attorney participated in a telephonic hearing with an IRS settlement officer. During that hearing, the officer advised that the IRS considered Applicant in a "could not collect" status. Based on his submission of a

---

<sup>8</sup> Tr. 24-25, 28, 37-40, 65; AE G, K, O. The tax attorney testified that Applicant's state tax refunds were \$6,428 for 2009 and \$3,678 for 2010. See Tr. 39, 66-67.

<sup>9</sup> Tr. 24-28, 32-37, 50-58; AE G, I, J, M, R. Applicant did not change jobs while working for that employer in 2009. See AE J.

<sup>10</sup> AE N-P.

financial statement, the IRS determined that initiation of a collection action against him would pose a financial hardship on him. At the time of the IRS hearing, Applicant owed the Federal Government \$44,448. The settlement officer informally indicated that she thought Applicant was a good candidate for an offer in compromise. On April 4, 2016, Applicant submitted an offer in compromise proposing that he pay \$125 per month to the IRS for 24 months. In an email, the tax attorney advised that the IRS may take as long as seven month to make a decision on that offer. The tax attorney indicated that Applicant has been cooperating with her in seeking a resolution of his tax problems.<sup>11</sup>

Applicant presented a reference letter that described him as honest and trustworthy. His supervisor stated that he is extremely diligent, conscientious, and tackles all his assignments with determination.<sup>12</sup>

### **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 unfavourable, 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

---

<sup>11</sup> Tr. 36-37, 44-58, 62, 72, 75; AE A, P, R.

<sup>12</sup> AE B, Q.

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 (4<sup>th</sup> 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**

AG ¶ 18 sets forth the security concern for financial considerations:

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 sets forth several conditions that raise potential security concerns. The evidence presented at the hearing established three of those disqualifying conditions:

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

(g) failure to file annual Federal, state, or local income tax returns as required . . . .

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 action to resolve the issue.

Applicant failed to file his 2009 and 2010 federal and state income tax returns as required. This failure was the result of an unexpected move of Applicant's family in 2010, while he was working overseas. The move caused tax records to be misplaced and delayed his filing of the income tax returns. These were conditions beyond Applicant's control that contributed to his financial problems.

In 2012, Applicant hired a tax solution company to prepare the delinquent tax returns. His missing federal income tax returns were filed in September 2012. Although the record does not reflect when the missing state income tax returns were filed, sufficient evidence was presented to establish that those tax returns were filed and Applicant received state income tax refunds for 2009 and 2010. Applicant refuted the allegation in SOR ¶ 1.d that he owed past-due state income taxes for those years.

In February 2013, Applicant established a repayment plan for his past-due 2009 and 2010 federal income taxes. He made payments under that plan from March through 2013 until he was advised by his tax preparer to stop the payments. The tax preparer apparently intended to challenge the amount owed to the IRS, but failed to do so. At a later unspecified time, the tax preparer went out of business.

In January 2015, Applicant hired a tax attorney to help him resolve his tax problems. Delays were encountered in obtaining Applicant's 2009 and 2010 tax records. After reviewing Applicant's W-2s for 2009, the tax attorney believed that Applicant's 2009 federal income tax return over-reported his income. Through communications with the Applicant's former employer, however, the tax attorney learned her suspicions about the over-reporting of his income were unfounded. Verifying the accuracy of the W-2s created further delays.

In a settlement hearing on March 3, 2016, the tax attorney learned that the IRS considers Applicant to be in a non-collection status due to his financial situation. The IRS settlement officer informally indicated that he was a good candidate for an offer in compromise. Such an offer was submitted on April 4, 2016. If the offer is accepted, Applicant will pay \$125 per month for 24 months to resolve his past-due federal tax issue. The IRS may take months to respond to that offer.

At the close of the record, Applicant owed \$44,448 to the Federal Government for past-due taxes. Delays have occurred in resolving that issue, but they are understandable under the circumstances. The record evidence established that Applicant is committed to resolving his past-due federal income taxes and that he will continue to take reasonable steps in the future to resolve this problem. Specifically, he is following the advice of his tax attorney on how to resolve this problem. I find that there are clear indications that his tax problem is under control and is being resolved. I also find that his financial problems are unlikely to recur and do not cast doubt on his current reliability, trustworthiness, and good judgment. AG ¶¶ 20(a), 20(c), and 20(d) apply. AG ¶ 20(b) partially applies. AG ¶ 20(e) applies to 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. Some of the factors in AG ¶ 2(a) were addressed under the Guideline F analysis, but some warrant additional comment.



Applicant honorably served in the USMC for about five years. He is a valued employee in his current civilian job. He has worked for defense contractors in combat zones. He encountered financial problems but has been working diligently to resolve them. Overall, the record evidence leaves me with no questions or doubts about Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude that Applicant mitigated the financial considerations security concerns.

### **Formal Findings**

Formal findings on the allegations set forth in the SOR are:

Paragraph 1, Guideline F:           FOR APPLICANT

Subparagraphs 1.a – 1.d:           For Applicant

### **Decision**

In light of all the circumstances presented by the record in this case, it is clearly consistent with the national interest to continue Applicant's eligibility for a security clearance. Eligibility for access to classified information is granted.

---

James F. Duffy  
Administrative Judge