



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



In the matter of:)	
)	
)	ISCR Case No. 09-06762
SSN:)	
)	
Applicant for Security Clearance)	

Appearances

For Government: D. Michael Lyles, Esquire, Department Counsel
For Applicant: *Pro se*

December 15, 2010

Decision

HENRY, Mary E., Administrative Judge:

Based upon a review of the case file, pleadings, exhibits, and testimony, I grant Applicant's eligibility for access to classified information.

Applicant signed an Electronic Questionnaire for Investigations Processing (e-QIP) version of a security clearance application (SF-86) on April 7, 2009. The Defense Office of Hearings and Appeals (DOHA) issued Applicant a Statement of Reasons (SOR) on June 4, 2010, detailing security concerns under Guideline F, Financial Considerations, that provided the basis for its preliminary decision to deny him a security clearance. The action was taken under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG) implemented on September 1, 2006.

Applicant acknowledged receipt of the SOR on June 10, 2010. He answered the SOR in writing on July 8, 2010 and requested a hearing before an administrative judge. DOHA received the request and Department Counsel was prepared to proceed on August 2, 2010. I received the case assignment on August 11, 2010. DOHA issued a notice of hearing on August 30, 2010, and I convened the hearing as scheduled on September 15, 2010. The Government offered exhibits (GE) 1 through 6, which were received and admitted into evidence without objection. Applicant testified. He submitted exhibits (AE) A through D, which were received and admitted into evidence without objection. DOHA received the transcript of the hearing (Tr.) on September 22, 2010. I held the record open until October 15, 2010, for Applicant to submit additional matters. Applicant timely submitted exhibits AE E through AE S without objection.

Procedural and Evidentiary Rulings

Notice

Applicant received the hearing notice less than 15 days before the hearing. (Tr. 10.) I advised Applicant of his right under ¶ E3.1.8 of the Directive to receive the notice 15 days before the hearing. Applicant affirmatively waived his right to the 15-day notice. (*Id.*)

Evidentiary ruling

Applicant mailed AE E through AE S by overnight delivery on October 14, 2010. He provided Department Counsel with additional documentation by overnight delivery dated October 19, 2010, with a request for the admission of his documents into the record even though the October 15, 2010 deadline had passed. The documents offered relate to 1) the judgment in SOR ¶ 1.d (marked as AE T) and 2) the state tax lien in SOR ¶ 1.b (AE U). On October 26, 2010, Applicant mailed a second set of documents to Department Counsel by overnight delivery with a request for the admission of these documents into the record even though his submission was past the October 15, 2010 deadline. (AE V) The Government objects to the admission of the documents on the grounds that the documents were submitted after the close of the record and Applicant, a non-lawyer, failed to provide a good cause reason for his late submission. Under the Doctrine of Administrative Finality, the Government argues that the record should not be kept open indefinitely and asks that these submissions not be admitted. The Government has not shown that it would be prejudiced by the admission of these documents.

Applicant's request for admission of documents AE T through AE V is considered a request to extend the time for him to submit evidence requested at the hearing. Applicant is not a lawyer and not versed in the specific need to submit a written request to extend the date for submission of documents into the record. Applicant did not specifically state a reason for his late submissions, one 4 days later and one 11 days late. He argued that the documents are important to his case. The document in AE V is dated October 14, 2010, one day before the close of the record. Applicant is

constrained by the procedures of the party with whom he is dealing, in this case the Internal Revenue Service (IRS). Because the letter is dated October 14, 2010, the day he sent his documents, he did not have this document to include with his submission and most likely did not receive it by October 15, 2010. Likewise, the letter in AE U was dated October 7, 2010, and given his late submission, it is assumed Applicant did not receive the letter in time to include it with his original submission. Based on his mailing dates, Applicant submitted these documents shortly after receiving them. Applicant's request for an extension of time to submit his documentation is granted. Department Counsel's objection is denied and AE T through AE V are admitted into evidence. The record closed on October 27, 2010.

Findings of Fact

In his Answer to the SOR, Applicant admitted the factual allegations in ¶¶ 1.a-1.d of the SOR. His admissions are incorporated herein as findings of fact. He denied the general security concern that he was living beyond his financial means and was at risk to engage in illegal acts to generate funds. He also provided additional information to support his request for eligibility for a security clearance. After a complete and thorough review of the evidence of record, I make the following additional findings of fact.

Applicant, who is 52 years old, works in human resources for a Department of Defense contractor. He began his current employment in 1999, after he retired from the United States Army in 1998. Applicant served in the Army for 20 years, where he worked as a military police officer and recruiter. Applicant has held a security clearance since 1978, without incident.¹

Applicant married his current wife about one year before the hearing. He married his previous wife in 1992 and they divorced in 2006. He has one son, who is 33 years old. He graduated from high school and attended college for a year.²

Applicant's financial problems began when he and his previous wife separated in 2006 and divorced in 2007. As part of their separation agreement and final divorce decree dated March 12, 2007, they agreed that each would pay one-half of a credit card debt, the remainder of their mortgage debt from the foreclosure sale of their house, and the remainder of the judgment obtained by their homeowners association against them. Concerning their federal and state taxes, they agreed that as of December 31, 2006, they owed \$4,451 in state taxes. They would equally pay the actual tax debt with Applicant paying any interest and penalties. They also agreed to continue paying their federal tax debt at \$500 a month under their established agreement.³

¹GE 1; Tr. 20.

²*Id.*

³AE S; Tr. 25, 40. This earlier tax issue is not raised in this case.

Applicant has always filed his federal and state tax returns. His 2006 federal tax return reflects a taxable income of \$62,000, taxes owed in the amount of \$12,051, and taxes withheld from his paycheck in the amount of \$3,429. For the tax year 2006, Applicant owed an additional \$8,622 in federal taxes. From September 2007 until April 2008, he paid a total of \$2,195 on this debt under a repayment agreement with the IRS. He resumed these payment in September 2009 and has made continuous payments through September 2010, totaling \$2,995.⁴

Applicant's 2007 federal tax return reflects a taxable income of \$88,335, taxes owed in the amount of \$18,842, and taxes withheld in the amount of \$9,305. For the tax year 2007, Applicant owed an additional \$9,537 in federal taxes. The IRS assessed additional taxes in the amount of \$2,166 in April 2010. The IRS credited him with \$600 in payments in 2010.⁵

Applicant's 2008 federal tax return reflects a taxable income of \$76,471, taxes owed in the amount of \$15,463, and taxes withheld in the amount of \$11,216. For the tax year 2008, Applicant owed an additional \$4,247 in federal taxes.⁶

Applicant's 2009 federal tax return reflects a taxable income of \$74,542, taxes owed in the amount of \$14,819, and taxes withheld in the amount of \$11,096. For the tax year 2009, Applicant owed an additional \$3,723 in federal taxes.⁷

Applicant's payment plan with the IRS required him to pay \$300 a month on all his past-due taxes. His payment is being applied to the 2006 tax year until this debt is paid. After the hearing, Applicant renegotiated his monthly payments to the IRS. He agreed to pay \$450 a month on his tax debt beginning in November 2010.⁸

Applicant and his former wife also owed state taxes. He paid two state tax liens for the tax year 2006 in the amounts of \$1,958 and \$698 plus \$50 in costs. The state released the liens on January 6, 2010. The state recorded a third tax lien on January 18, 2007 (SOR ¶ 1.b) in the amount of \$4,389 against Applicant and his former wife for the tax year 2004. Applicant provided documentation that this account is now held by a collection agency, and that the current balance due is \$795 plus other charges of \$70. On October 7, 2010, after his former wife defaulted on this debt payment, he agreed to pay the creditor \$100 on this debt until the remaining balance is paid in full.⁹

⁴AE N; AE O.

⁵AE L; AE P.

⁶AE K; AE R.

⁷AE K; AE R.

⁸GE 2; AE A; AE M.

⁹GE 2; AE D; AE U; Tr. 27-32.

The State tax debt in SOR ¶ 1.a is also held by a collection agency. His documentation reflects that he owes \$5,885 on this debt. In July 2010, he agreed to pay this collection agency \$265 a month until his debt was paid in full.¹⁰

Applicant's employer pays him every two weeks. His gross pay for 80 hours is \$2,865 a pay period for a gross monthly income of \$5,730. His net monthly income is now \$3,414. Applicant receives \$1,621 in gross military retirement pay and \$675 in net pay after an allotment of \$741 is taken from his retirement pay.¹¹ He pays \$88 a month in federal taxes and \$20 a month in state taxes out of his retirement pay. His wife earns \$30 an hour in base pay. Her income varies, depending upon overtime pay. Her net monthly income averages approximately \$3,600. Applicant and his wife have a net monthly income of \$7,700 a month.¹²

Applicant's tax returns for 2006, 2007, 2008, and 2009 reflect that he filed as a single person with one exemption. His leave and earnings statements do not show how many exemptions he claims. He increased his federal withholding taxes in 2007, 2008, and 2010. He increased his withholding amount a second time in September 2010 by \$144 a month.¹³ His military retirement pay statement indicates that he claims one exemption as a single person. His wife's earnings statement shows that she changed her exemptions from 10 to 5 in August 2010. This change increased the amount of taxes being withheld from her pay by \$266 a month. Applicant believes these changes in his tax withholdings will solve his tax issues in the coming years.¹⁴

Applicant prepared a new personal financial statement. He indicates he has a net monthly income of \$8,343. He shows his military retirement income as \$1,407 a month, which is higher than the statement he provided. His former wife receives \$405 a month from his retirement pay as part of their divorce settlement. He and his wife have monthly expenses totaling \$3,372, including his payment to his former wife. He also prepared a statement of monthly payments on their debts. Their payments total \$3,094 and include two payments (\$100 and \$265) for state tax debt, \$350 for his IRS, and other debts which are current and not an issue in this case. Under his new repayment agreement with the IRS, his monthly expenses will increase by \$100 as he will be paying \$450 a month to the IRS. After paying all the household bills and their expenses, Applicant and his wife have \$1,777 remaining each month.¹⁵

¹⁰AE C; AE G.

¹¹This allotment is not explained. AE I; AE S.

¹²AE H-AE J; AE S.

¹³Applicant submitted his earnings statements for July, August, and September 2010. There is some variation in his net pay over this time, but it is not significant. His September earnings reflect his most current pay. AE J.

¹⁴AE H-AE J; AE O- AE P; Tr. 25, 40.

¹⁵AE E; AE F.

Applicant obtained a copy of the judgment entered against him and his prior wife and in favor of his previous homeowners association. He believes the judgment was resolved when their house was sold, but he has not received any paperwork from the mortgage company. He contacted the law firm, which filed the civil action, for additional information. The law firm advised that it is researching the matter, but did not provide any additional information. Applicant and his wife have not had financial counseling.¹⁶

Policies

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the adjudicative guidelines. In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are used in evaluating an applicant's eligibility for access to classified information.

These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied in conjunction with the factors listed in the adjudicative process. The administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense decision. According to AG ¶ 2(c), the entire process is a conscientious scrutiny of a number of variables known as the "whole-person concept." The administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable, in making a decision.

The protection of the national security is the paramount consideration. AG ¶ 2(b) requires that "[a]ny doubt concerning personnel being considered for access to classified information will be resolved in favor of national security." In reaching this decision, I have drawn only those conclusions that are reasonable, logical, and based on the evidence contained in the record.

Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, an applicant is responsible for presenting "witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel. . . ." An applicant has the ultimate burden of persuasion for obtaining a favorable security decision.

A person who seeks access to classified information enters into a fiduciary relationship with the Government predicated upon trust and confidence. This relationship transcends normal duty hours and endures throughout off-duty hours. The Government reposes a high degree of trust and confidence in individuals to whom it grants access to classified information. Decisions include, by necessity, consideration of the possible risk an applicant may deliberately or inadvertently fail to protect or safeguard classified information. Such decisions entail a certain degree of legally

¹⁶AE T; Tr. 36-38.

permissible extrapolation as to potential, rather than actual, risk of compromise of classified information.

Section 7 of Executive Order 10865 provides that decisions shall be “in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.” See *also* EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information).

Analysis

Guideline F, Financial Considerations

The security concern relating to the guideline for Financial Considerations is set out in AG ¶ 18:

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 describes the disqualifying conditions that could raise security concerns. I have considered all the conditions, and especially the following:

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

Appellant developed significant federal and state tax problems when he and his prior wife separated in 2006 and divorced in 2007. He still owes taxes to the federal and state governments. These two disqualifying conditions apply.¹⁷

The Financial Considerations guideline also includes examples of conditions that can mitigate security concerns. I have considered mitigating factors AG ¶ 20(a) through 20(f), and especially the following:

- (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

¹⁷AG ¶ 19(g) does not apply as Applicant always filed his tax returns with the IRS and state government.

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's individual federal tax issues began in 2006 after he and his wife separated. His tax filing status changed, resulting in a tax debt because insufficient taxes had been withheld from his pay. When his tax problems first started, he worked out a payment plan with the IRS. In 2007, and again in 2008, he increased the amount of money being withheld from his pay to pay his federal taxes. He expected the increased withholdings would be sufficient to pay his taxes each year, but the increase was insufficient. In 2010, he increased the amount of taxes withheld each pay period twice. He believes he has his future tax problems solved. AG ¶ 20(b) partially applies because his tax problems started with his separation and divorce, and he has acted responsibly under the circumstances with his federal tax debt.

Applicant paid two small State tax liens. One State tax debt is 80% paid. He contacted the collection companies, which are the collection agent for the State, and has developed a payment plan for the remaining State tax debts. He also worked out a payment plan with the IRS on several occasions. In September 2009, he began repaying the IRS \$300 a month under a repayment agreement. In October 2010, he renegotiated this agreement to increase his monthly payment to \$450. He has shown a good-faith effort to resolve his tax debts. He pays his other debts in a timely manner, and his finances are under control. He contacted the attorney who represented the homeowners association, and as of the close of the record, he had not received any definitive information from this attorney about the status of this debt. He is willing to pay the debt if he owes it. AG ¶¶ 20(c) and 20(d) are applicable.¹⁸

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 an 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

¹⁸AG ¶¶ 20(e) and 20(f) are not applicable in this case.

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. The decision to grant or deny a security clearance requires a careful weighing of all relevant factors, both favorable and unfavorable. In so doing, an administrative judge must review all the evidence of record, not a single item in isolation, to determine if a security concern is established and then whether it is mitigated. A determination of an applicant's eligibility for a security clearance should not be made as punishment for specific past conduct, but on a reasonable and careful evaluation of all the evidence of record to decide if a nexus exists between established facts and a legitimate security concern.

In assessing whether an Applicant has established mitigation under Guideline F, the Appeal Board provided the following guidance in ISCR Case No. 07-06482 at 3 (App. Bd. May 21, 2008):¹⁹

In evaluating Guideline F cases, the Board has previously noted that the concept of "meaningful track record" necessarily includes evidence of actual debt reduction through payment of debts." See, e.g., ISCR Case No. 05-01920 at 5 (App. Bd. Mar. 1, 200). However, an applicant is not required, as a matter of law, to establish that he has paid off each and every debt listed in the SOR. See, e.g., ISCR Case No. 02-25499 at 2 (App. Bd. Jun. 5, 2006). All that is required is that an applicant demonstrate that he has ". . . established a plan to resolve his financial problems and taken significant actions to implement that plan." See, e.g., ISCR Case No. 04-09684 at 2 (App. Bd. Jul. 6, 2006). The Judge can reasonably consider the entirety of an applicant's financial situation and his actions in evaluating the extent to which that applicant's plan for the reduction of his outstanding indebtedness is credible and realistic. See Directive ¶ E2.2(a) ("Available, reliable information about the person, past and present, favorable and unfavorable, should be considered in reaching a determination.") There is no requirement that a plan provide for payments on all outstanding debts simultaneously. Rather, a reasonable plan (and concomitant conduct) may provide for the payment of such debts one at a time. See, e.g., ISCR Case No. 06-25584 at 4 (App. Bd. Apr. 4, 2008). Likewise, there is no requirement that the first debts actually paid in furtherance of a reasonable debt plan be the ones listed in the SOR.

¹⁹Cited in ISCR Case No. 08-06567 at 3 (App. Bd. Oct. 29, 2009).

The evidence in support of granting a security clearance to Applicant under the whole-person concept is more substantial than the evidence in support of denial. In reaching a conclusion, I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. Applicant's individual tax problems began when he separated from his then wife in 2006 and they divorced in 2007. His tax filing status for the 2006 tax year changed to single with one exemption, which significantly increased the amount of taxes he owed. The amount of money withheld from his pay was insufficient to pay his tax debt. He developed a repayment plan with the IRS, which he paid for a period of time. He also increased the amount of money withheld from his pay in 2007.

When he prepared and filed his 2007 tax return in 2008, he again found himself with the same problem as occurred in the 2006 tax year. The amount of money withheld from his pay was insufficient to pay his tax debt, leaving him with a deficiency. He again increased the money withheld from his pay for taxes in 2008. Since this amount was not been sufficient to pay his taxes for the years 2008 and 2009, he increased the amount of taxes withheld from his pay twice in 2010.

Applicant negotiated a repayment plan with the IRS in 2007 and in 2009. He recently renegotiated his monthly payment to a higher amount. He now pays the IRS 50% more than his earlier payment. He has payment plans in place to resolve his State tax debts. Applicant has not been completely diligent with resolving his tax debts in the past, but he has been working steadily for the last 18 months to pay his State tax debt and to continue with paying his federal tax debt.

Applicant's tax debts spiraled out of control because he did not have sufficient taxes withheld from his pay. Part of this problem may relate to the fact he receives retirement pay plus his full-time paycheck. Although taxes are withheld from each income, the two incomes create a higher tax bracket for him, which means higher taxes. He is working diligently to resolve this problem.

Applicant served in the Army for 20 years. He received extensive training and has a good record of commendable duty performance during and after his military service. He has never violated procedures for handling classified materials in the 30 years he has held a security clearance. He has sufficient income each month to pay his debts. He does not live beyond his financial means. Most significantly, he has taken affirmative action to pay or resolve most of the delinquent debts raising security concerns. (See AG ¶ 2(a)(6).) Thus, his tax indebtedness cannot be a source of improper pressure or duress. Of course, the issue is not simply whether all his debts are paid: it is whether his financial circumstances raise concerns about his fitness to hold a security clearance. While he is still working on the resolution of his taxes, this debt is not sufficient to raise security concerns. (See AG ¶ 2(a)(1).)

Overall, the record evidence leaves me without questions or doubts as to Applicant's eligibility and suitability for a security clearance. For all these reasons, I

conclude Applicant mitigated the security concerns arising from his finances under Guideline F.

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:	FOR APPLICANT
Subparagraph 1.a:	For Applicant
Subparagraph 1.b:	For Applicant
Subparagraph 1.c:	For Applicant
Subparagraph 1.d:	For Applicant
Subparagraph 1.e:	For Applicant
Subparagraph 1.f:	For Applicant
Subparagraph 1.g:	For Applicant
Subparagraph 1.h:	For Applicant
Subparagraph 1.i:	For Applicant
Subparagraph 1.j:	For Applicant

Conclusion

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

MARY E. HENRY
Administrative Judge