



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



In the matter of:)	
)	
)	ISCR Case No. 10-06718
)	
Applicant for Security Clearance)	

Appearances

For Government: Julie R. Mendez, Esquire, Department Counsel
For Applicant: *Pro se*

10/16/2012

Decision

HENRY, Mary E., Administrative Judge:

Based upon a review of the pleadings and exhibits, Applicant’s eligibility for access to classified information is denied.

Statement of the Case

Applicant completed and certified an Electronic Questionnaire for Investigations Processing (e-QIP) on April 19, 2010. The Defense Office of Hearings and Appeals (DOHA) issued Applicant a Statement of Reasons (SOR) on March 23, 2012, detailing security concerns under Guideline F, Financial Considerations, and Guideline E, Personal Conduct. 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 For Determining Eligibility for Access to Classified Information* (AG) implemented on September 1, 2006.

Applicant acknowledged receipt of the SOR on April 2, 2012. He submitted a notarized written response to the SOR allegations dated April 9, 2012, and he requested a decision on the written record in lieu of a hearing.

Department Counsel prepared a file of relevant material (FORM) and mailed Applicant a complete copy on August 21, 2012. Applicant received the FORM on August 27, 2012. He had 30 days from receipt of the FORM to file objections and submit material in refutation, extenuation, or mitigation. He did not submit a response. DOHA assigned this case to me on October 2, 2012. The Government submitted nine exhibits, which have been marked as Items 1-9 and admitted into the record. The SOR is Item 1, and Applicant's response to the SOR is Item 2.

Findings of Fact

In his Answer to the SOR, Applicant admitted the factual allegations in ¶¶ 1.a - 1.i, and 2.a of the SOR. His admissions are incorporated herein as findings of fact. He denied the factual allegations in ¶¶ 2.d - 2.g of the SOR.¹ Applicant admitted the factual allegations in ¶¶ 2.b and 2.c with an explanation which negates the intentional language of the allegation. 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 56 years old, works as a structural fabricator for a Department of Defense contractor. Applicant began his current employment in March 2008 after three months of unemployment. From November 2000 until December 2007, Applicant worked regularly as an aircraft mechanic.²

Applicant graduated from high school in 1974 and attended trade school from 1972 until 1974. He married his first wife in 1974, and they divorced two years later. Applicant lives with his fiance and has since 2000. Applicant has three children from other relationships. His daughters are 27 and 24 years old, and his son is 26 years old.³

During his 2003 investigative interview, Applicant acknowledged owing \$15,525 in child support for his oldest daughter and \$58,468 in child support for his son and

¹When SOR allegations are controverted, the Government bears the burden of producing evidence sufficient to prove controverted allegations. Directive, ¶ E3.1.14. "That burden has two components. First, the Government must establish by substantial evidence that the facts and events alleged in the SOR indeed took place. Second, the Government must establish a nexus between the existence of the established facts and events and a legitimate security concern." See ISCR Case No. 07-18525 at 4 (App. Bd. Feb. 18, 2009), (concurring and dissenting, in part) (citations omitted). 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. 08-06605 at 3 (App. Bd. Feb. 4, 2010); ISCR Case No. 08-07290 at 2 (App. Bd. Nov. 17, 2009).

²Item 4.

³Item 4.

younger daughter. He indicated that he paid child support obligations on and off from the late 1980s until February 2002, when he began regular monthly payments through garnishment of his wages. These payments averaged approximately \$550 a month. The April 2010 credit report reflected that his balance on the larger debt had reduced about \$8,000 and his balance on the smaller child support debt had reduced \$6,000. As an attachment to his response to DOHA interrogatories dated December 9, 2011, Applicant submitted a copy of his earnings statement for the pay period ending November 20, 2011. This earnings statement showed a \$302 bi-weekly deduction for child support and a total payment of \$6,904 for the year 2011. Credit reports from 2011 and 2012 show a reduction in his child support balances, with a total remaining balance of approximately \$46,000 in April 2012.⁴

Applicant stopped filing his federal and state tax returns beginning with the 1991 tax year because his 1990 tax refund was intercepted and applied solely to his arrearage for his younger children without giving his older daughter any of the refund. In his 2003 signed sworn statement, Applicant indicated that the Internal Revenue Service (IRS) advised him that he had not filed his federal tax return for the years 1991, 1992, 1995, 1997, 1998, 2000, and 2001. He also indicated that he had made an arrangement to pay \$100 a month on this debt, but he has not shown that he made these payments. In his 2010 interview with the Office of Personnel Management (OPM) investigator, Applicant acknowledged that he had not filed his federal tax returns for several more years. He also stated that he filed his tax returns for the years 2004 and 2006 late.⁵

The credit reports of record reflect that Applicant's home state has filed tax liens against him for unpaid income taxes for the years 1987 through 1990 and 2003 through 2006. Applicant acknowledges that he has not filed his state tax returns since 1990. He has not taken any action to resolve his state tax liens and state tax debts.⁶

Applicant contacted a tax service for assistance with his taxes. In June 2011, he hired an attorney with a tax service to represent him in his tax issues. Through his attorney, Applicant made an offer to the IRS to pay \$550 a month to resolve his tax liability. Applicant has not provided any documentation to show that the IRS accepted or rejected his offer, nor has he provided evidence of any payments to the IRS on his tax debt.⁷

As of November 2011, Applicant earned \$5,173 a month, plus some overtime pay. His monthly deductions included federal and state taxes, medical, life insurance, social security, medicare, and child support. His net monthly pay averages

⁴Item 4 - Item 7.

⁵Item 7; Item 8.

⁶Item 5 - Item 9.

⁷Item 7.

approximately \$3,100. He has sufficient income to pay his monthly expenses. The credit reports and his submission to the IRS indicate that he does not own real estate.⁸

When he completed his e-QIP, Applicant answered “No” to the following questions in Section 26: Financial Record:

- c. Have you failed to pay Federal, state, or other taxes, or to file a tax return, when required by law or ordinance?
- d. Have you had a lien placed against your property for failing to pay taxes or other debts?
- e. Have you had a judgment entered against you?
- j. Have you been delinquent on court-imposed alimony or child support payments?
- k. Have you had your wages, benefits, or assets garnished or attached for any reason?

When Applicant met with the security investigator on May 13, 2003, he discussed, in detail, his nonpayment of child support, the amount owed, and acknowledged past and current wage garnishments for child support payments and arrearage. In addition, he and the interviewer discussed the status of his federal and state tax returns. Applicant admitted not filing his federal and state tax returns for many years and owing money to the federal and state governments on his taxes. He denied any knowledge of a state tax lien.⁹

In his response to the SOR, Applicant denies any knowledge of the state tax liens filed between August 2004 and March 2007. He denies intentionally falsifying his answer to SOR allegations 2.e and 2.f because he did not know an insurance accident was considered a judgment (2.e), and he was paying his child support every two weeks (2.f). In his answer to allegation 2.c, he states that he did not fully understand the question and to allegation 2.g, he states that he may have mistakenly answered the question.¹⁰

The SOR alleges that Applicant falsified his answers to two financial questions on his January 9, 2002 security clearance application. The January 2002 security clearance application is not in the record. In his answer to the SOR, Applicant said he did not fully understand the questions, and in his 2003 interview, Applicant denies

⁸Item 7.

⁹Item 8.

¹⁰Item 3.

intentionally falsifying his answers on his security clearance application. He explained that he did not read the questions correctly.¹¹

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

¹¹Item 1; Item 8.

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 the following are potentially applicable:

- (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.

Appellant developed significant financial problems with payment of his child support. He has not filed his federal and state income tax returns for many years. Most of the debts have not been resolved. These three disqualifying conditions apply.

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 the following are potentially applicable:¹²

¹² 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):

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, 2007). 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.”

(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 still owes back child support. However, the credit reports of record and his November 2011 earnings statement show that he is making regular payments on these debts from his pay through a garnishment. He is resolving his child support debts. AG ¶¶ 20(c) applies to SOR allegations 1.a and 1.b, which are found in favor of Applicant. Applicant decided not to file his federal and state income tax returns after his 1990 tax refunds were taken and applied to only one of his child support debts. He has spoken with the IRS in the past about his tax returns, and in 2011, he made an offer of payment to resolve his past-due federal taxes. Applicant is given some credit under AG ¶ 20(d) for this offer. However, he did not provide any information about the current status of his offer nor has he shown that he has made any payments on his federal tax debt. He has taken no action on his state tax debt. The remaining allegations under Guideline F are found against Applicant because he has not shown that he has or is resolving these debts.

Guideline E, Personal Conduct

AG ¶ 15 expresses the security concern pertaining to personal conduct:

Conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations can raise questions about an individual's reliability, trustworthiness and ability to protect classified information. Of special interest is any failure to provide truthful and candid answers during the security clearance process or any other failure to cooperate with the security clearance process.

AG ¶ 16 describes conditions that could raise a security concern and may be disqualifying:

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.

(a) deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment qualifications, award benefits or status, determine security clearance eligibility or trustworthiness, or award fiduciary responsibilities.

For AG ¶¶ 16(a) and 16(b) to apply, Applicant's omission must be deliberate. The Government established that Applicant omitted material facts from his April 2010 e-QIP, when he answered "no" to five questions about his finances. This information is material to the evaluation of Applicant's trustworthiness and honesty. In his response, he denied that he intentionally falsified his answers on his e-QIP or that he intended to hide his past financial problems from the Government. When the allegation of falsification is controverted, the Government has the burden of proving it. Proof of an omission, standing alone, does not establish or prove an applicant's intent or state of mind when the omission occurred. An administrative judge must consider the record evidence as a whole to determine whether there is direct or circumstantial evidence concerning an applicant's intent or state of mind at the time the omission occurred.¹³

Applicant admitted that he failed to disclose his failure to file his tax returns. The Government has been aware since 2003 that Applicant had not filed tax returns for many years. Given this knowledge and Applicant's admissions in 2003, Applicant lacked the requisite intent to hide information about his tax filings from the Government. Concerning the liens filed by the state, the liens are against him as a person, because he does not own property. Since this question specifically asks if any liens had been filed against property he owned, his answer is not a falsification. Applicant has been paying his child support for many years, and his belief that by paying this debt, he was current is reasonable. Given his denial of intentional falsification on these five answers, the Government has not provided any evidence which supports its burden of proving intentional falsification on allegations 2.c through 2.g.

The Government did not provide a copy of the January 2002 security clearance application. However, Applicant admitted the facts in SOR allegation 2.b, but said that he did not understand the question in 2002. Since the questions address current debts older than 90 days and debts over 180 days, Applicant's misunderstanding about the scope of the questions is not unreasonable. In 2002, his financial problems related to child support, which he was paying, and unfiled taxes which are usually addressed in a specific question on the security clearance application. The Government has failed to establish that the requisite intent to show that Applicant falsified his answers on his 2010 e-QIP. AG ¶¶16(a) is not established. SOR allegations 2.b through 2.g are found in favor of Applicant. SOR allegation 2.a is a statement of fact which is specifically addressed under Guideline F, Financial Considerations. Guideline E, Personal Conduct, is found in favor of Applicant.

¹³See ISCR Case No. 03-09483 at 4 (App. Bd. Nov. 17, 2004)(explaining holding in ISCR Case No. 02-23133 at 5 (App. Bd. Jun. 9, 2004)).

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 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 reaching a conclusion, I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. Applicant works steadily and does not have problems at work. He can support himself financially and does. Applicant fell behind in his child support payments when his children were young and his income fluctuated. For many years he has worked steadily and has paid his child support arrearage through a wage garnishment. He is slowly reducing this debt. He deliberately chose not to file his federal and state income taxes many years ago because he did not agree with the apportionment of the tax refund. He has not taken any steps to resolve his state tax debt and has only made a small effort to undertake the resolution of his federal tax debt. His decision not to file his tax returns raises questions about his judgment. His failure to resolve his tax issues when he has been aware since 2003 that the Government has a concern about this conduct reflects poor judgment and decision-making. His unpaid taxes and unresolved tax issues remain a security concern.

Overall, the record evidence leaves me with 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 personal conduct under

Guideline E, but he has not 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:	AGAINST APPLICANT
Subparagraph 1.a:	For Applicant
Subparagraph 1.b:	For Applicant
Subparagraphs 1.c-1.l:	Against Applicant
Paragraph 2, Guideline E:	FOR APPLICANT
Subparagraphs 2.a-2.g:	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.

MARY E. HENRY
Administrative Judge