



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



In the matter of:)
)
) ISCR Case No. 10-07265
)
)
Applicant for Security Clearance)

Appearances

For Government: David F. Hayes, Esq., Department Counsel
For Applicant: *Pro se*

October 24, 2011

Decision

RIVERA, Juan J., Administrative Judge:

Applicant did not file his Federal and state income tax returns for five years and acquired a significant debt. Notwithstanding, since August 2009, he has made a good-faith effort to resolve these debts, established a track record of financial responsibility, and demonstrated that his financial problems are being resolved and are under control. He now understands what is required of him to be eligible for a security clearance. Clearance is granted.

Statement of the Case

Applicant submitted a security clearance application (SCA) on January 26, 2010. After reviewing the results of the ensuing background investigation, adjudicators for the Defense Office of Hearings and Appeals (DOHA) were unable to make a preliminary affirmative finding¹ that it is clearly consistent with the national interest to grant Applicant's request for a security clearance.

¹ Required by Executive Order 10865, *Safeguarding Classified Information Within Industry*, dated February 20, 1960, as amended; and Department of Defense (DOD) Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), dated January 2, 1992, as revised.

On May 2, 2011, DOHA issued Applicant a Statement of Reasons (SOR) alleging security concerns under Guideline F (Financial Considerations) of the adjudicative guidelines (AG).²

Applicant answered the SOR on June 6, 2011. He requested a hearing before an administrative judge. The case was assigned to me on July 5, 2011. DOHA issued a notice of hearing on July 8, 2011, convening a hearing on August 19, 2011. At the hearing, the Government offered eight exhibits (GE 1 through 8). Applicant testified, and offered one exhibit (AE 1), comprised of an 11 page letter and Tabs A through Q. All exhibits were received without objection. DOHA received the transcript of the hearing (Tr.) on August 19, 2011.

Findings of Fact

Applicant admitted the four factual allegations in the SOR. His admissions are incorporated herein as findings of fact. After a thorough review of the evidence of record, his answers to the SOR and interrogatories, and his demeanor and testimony, I make the following additional findings of fact.

Applicant is a 39-year-old senior principal information technology consultant employed by a large defense contractor. He attended college from 1990 until 1997, when he received his bachelor's degree in Information Science and Systems. He completed his master's degree of Information Systems Technology in December 2006. Applicant married his spouse in April 2008. They have two children, ages two and eight months. Applicant's spouse is employed, and she contributes to the household finances.

Applicant worked for other Government contractors and occupied public trust positions before he was hired by his current employer. He was hired by his current employer in December 2009, and shortly after he was hired he was granted an interim secret clearance. There is no evidence to show that Applicant has compromised or caused others to compromise classified information while he was assigned to a public trust position, or since he was granted his interim security clearance.

In his answers to the financial questions in his January 2010 SCA, Applicant disclosed that during the last seven years he failed to timely file his federal and state income tax returns as required by law, to pay federal and state taxes, and that he had federal and state liens filed against his property for his owed taxes. At the time, his credit reports did not list his tax liens to the state or the Internal Revenue Service (IRS). Applicant's background investigation addressed his financial and tax problems. The

² Adjudication of this case is controlled by the AGs, implemented by the DOD on September 1, 2006.

investigation revealed that Applicant owes the IRS \$84,575 (SOR ¶ 1.a). He owes his state \$25,012 (SOR ¶¶ 2.b through 2.d).

Applicant failed to timely file his Federal and state income tax returns for tax years 2001, 2003, 2006, 2007, and 2008. Concerning tax years 2001 and 2003, Applicant explained that he believed he had filed his 2001 and 2003 income tax returns. Sometime in 2009, the IRS informed him it did not have a copy of his tax returns for those years. Applicant testified that his failure to file his 2001 and 2003 income tax returns must have been an oversight because he believed he did not owe any income tax. Ultimately, he owed income tax for tax year 2001, but he did not owe any money for tax year 2003. He filed his 2001 and 2003 income tax returns in 2009.

Applicant readily accepted responsibility for his failure to file his 2001, 2003, 2006, 2007, and 2008 income tax returns. He acknowledged he was negligent in the handling of his income tax returns and his failure to pay his income tax. Applicant provided some explanations, not as an excuse for his questionable behavior, but to place his behavior in the context of his personal and financial circumstances. Applicant explained that in mid-2006, he started to work as an independent contractor for the first time. At the time, he knew he was supposed to make quarterly payments toward his income taxes, but he was overwhelmed by his new responsibilities.

In September 2007, Applicant moved into one of his cousin's homes because his cousin could not afford his two mortgages. He assumed the home mortgage (\$4,200) with the intent to help his cousin, and ultimately to purchase the home. He rented his town home at a little less than its mortgage payment (\$1,830). In February 2009, his financial situation became strained when his town home mortgage payments ballooned to \$3,200 a month. He had difficulty making his town home mortgage payments and the rental property mortgage payments (\$4,200).

Applicant's spouse became pregnant with their first child in mid-2008. She had medical problems associated with her pregnancy, and doctors feared she would lose her child. She delivered her son prematurely, and he was in the hospital from April 28, 2009 until May 28, 2009. Her troubled pregnancy and his son's medical care caused additional medical expenses. He was distracted with his wife and child's medical problems and he continued to neglect his tax situation. In May 2009, Applicant purchased the home from his cousin in a short sale. After the purchase, the home mortgage payment went down to \$3,400. In February 2010, his town home mortgage payment also went down to \$2,666.

Applicant testified that because of his strained financial situation, he did not have sufficient income to pay his debts and his tax obligations. He elected to pay his day-to-day living expenses and other debts to protect his credit rating. He neglected to pay his Federal and state income taxes. His credit reports show that he did not miss any payments and was not delinquent in any of his other financial obligations.

Around July 2009, the IRS sent Applicant a letter concerning his failure to file his income tax returns and to pay his income taxes. He hired an accountant to help him file his 2006, 2007, and 2008 income tax returns. In November 2009, he filed with the IRS a Collection Information Statement (433-F) proposing a payment plan. In December 2009, before the IRS accepted his offer, Applicant began to make good-faith monthly payments of \$750. He was hired by his employer in December 2009, and submitted his SCA in January 2010. Applicant has been forthright through the security clearance process. He disclosed his tax problems in his SCA and was forthcoming during his background interview, and at his hearing.

In July 2011, Applicant hired a tax attorney to help him expedite the payment of his delinquent taxes to the IRS and the state. In August 2011, the IRS approved his payment plan. Applicant agreed to pay \$750 a month from August 2011 until July 2012. Thereafter, he is required to pay \$3,000 a month until his debt is satisfied. He anticipates paying off his IRS debt in 36 months. (AE 1, Tab N) He also entered into a payment plan with the state. He is required to pay \$676 a month until his debt is satisfied. He anticipates paying off his state debt in 48 months. (AE1, Tab N)

Applicant is currently making \$137,000 a year. In addition, he receives quarterly bonuses of approximately \$4,000. He presented thorough and detailed budget and payment plans indicating he has the financial resources to pay his delinquent tax obligation and his current debts. Additionally, his spouse is employed and she contributes financially to the household.

Applicant credibly expressed remorse for his negligence in handling his income tax obligations. He understands his legal responsibilities. He also is aware of the security clearance consequences of his actions, and what is expected of him to be eligible for a security clearance.

Applicant's program manager submitted a "compelling need" statement requesting an exception to the personal security standards and procedures. He considers Applicant to be an invaluable asset with unique and irreplaceable skills and experience. His duties are in the critical path of the company's project plan. Without him, the company will not be able to meet its delivery schedule. Overall, Applicant is considered to be an exemplary consultant. His work ethic, loyalty, security posture, and integrity are above reproach. He demonstrates excellent judgment and decision making.

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 unfavorable 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 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 (4th 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

Under Guideline F, the security concern is that 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 ¶ 18.

Applicant failed to timely file his 2001, 2003, 2006, 2007, and 2008 Federal and state income tax returns. He owes approximately \$84,575 to the IRS and \$25,000 to his state for past due income taxes. Although he has established payment plans with both the IRS and his state, he will not resolve these debts until 2014-2015. AG ¶ 19(a): "inability or unwillingness to satisfy debts;" AG ¶ 19(c): "a history of not meeting financial obligations," and AG ¶ 19(g): "failure to file annual Federal, state, or local income tax returns as required or the fraudulent filing of the same" apply.

AG ¶ 20 provides four conditions that could mitigate the financial considerations security concerns:

- (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; and
- (d) the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts.

Applicant failed to timely file his federal and state income tax returns for five different tax years. His behavior is recent, and he owes a substantial debt to both the IRS and the state. I find that his failure to file his income tax returns did not occur under extraordinary circumstances. Notwithstanding, considering his remediation efforts since August 2009 (filing his income tax returns, making good-faith payments, establishing a payment plan), his changed circumstances, and his learning from his mistakes, I find

that his questionable behavior is unlikely to recur. AG ¶ 20(a) applies, but it does not fully mitigate the security concern.

Applicant claimed that circumstances beyond his control contributed to his failure to timely file his income tax returns and to pay his taxes. I disagree. Applicant knew of his legal obligation to make quarterly payments on his income taxes, and to timely file his income tax returns. He deliberately failed to do so. Additionally, he overextended himself financially by assuming his cousin's home mortgage without properly considering his own financial situation. His actions were within his control.

Applicant's wife's and son's medical problems may be considered as circumstances beyond his control that could have distracted him from fulfilling his legal obligation to timely file his income tax returns. Notwithstanding, since he married his wife in April 2008, and his son was born in April 2009, he failed to show how these circumstances beyond his control contributed to his failure to file his income tax returns for tax years 2001, 2003, 2006, and 2007. AG ¶ 20(b) applies, but it does not fully mitigate the concern. Applicant failed to show he acted responsibly prior to August 2009.

AG ¶¶ 20(c) and (d) fully apply. In August 2009, Applicant sought the assistance of an accountant to complete and file his delinquent income tax returns. He then started to make good-faith payments on his debt, established payment plans with the IRS and his state, and he has been consistently making his monthly payments. AG ¶¶ 20(e) and (f) are not pertinent to the facts in this case.

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 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. AG ¶ 2(c). I have incorporated in my whole-person analysis my comments on the analysis of Guideline F.

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. Applicant receives credit for his exemplary work performance, and his unique skills and experience that make him an invaluable asset to his employer. He has held a security clearance since 2009 with no adverse incidents. He is a good father and husband.

Applicant demonstrated a serious lack of judgment and an unwillingness to abide by rules and regulations when he failed to timely file his income tax returns and to pay his taxes. Notwithstanding, considering the record as a whole, I find that his actions since August 2009 mitigate the financial considerations security concerns. He sought professional assistance to file his delinquent income tax returns. He then initiated good-faith payments on his debt and established payment plans with the IRS and his state. He has been consistently complying with his payment plans. He has established a track record of financial responsibility, demonstrated that his financial problems will be resolved in the foreseeable future, and that they are unlikely to recur.

Applicant has matured as a result of his marriage and the birth of his two children. He now has a stable, important position that provides him and his family with a substantial income. He is remorseful about his past questionable behavior. Moreover, through his remediation actions since August 2009, he has demonstrated that he has learned his lesson. He now understands what is required of him to be eligible for a security clearance. He mitigated the security concerns raised under financial considerations.

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
Subparagraphs 1.a – 1.d:	For Applicant

Conclusion

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

JUAN J. RIVERA
Administrative Judge