



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



In the matter of:)	
)	
)	ISCR Case No. 11-05424
)	
Applicant for Security Clearance)	

Appearances

For Government: Stephanie C. Hess, Esquire, Department Counsel
For Applicant: *Pro se*

01/11/2013

Decision

ANTHONY, Joan Caton, Administrative Judge:

After a thorough review of the pleadings, testimony, and exhibits, I conclude that Applicant failed to rebut or mitigate the Government’s security concerns under Guideline F, Financial Considerations. His eligibility for a security clearance is denied.

Statement of the Case

Applicant submitted an Electronic Questionnaire for Investigations Processing (e-QIP) on November 8, 2010. On April 13, 2012, the Department of Defense (DOD) issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guideline F, Financial Considerations. DOD acted under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG) effective within DOD for SORs issued after September 1, 2006.

Applicant’s answer to the SOR was undated. By letter dated June 30, 2012, he declined to have a hearing before an administrative judge. On October 12, 2012, he communicated with Department Counsel and requested a hearing. I marked Applicant’s request as Hearing Exhibit (HE) 1 and entered it in the record. The case was assigned

to me on November 9, 2012. I convened a hearing on December 3, 2012, to consider whether it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. The Government called no witnesses and introduced six exhibits, which were marked Ex. 1 through 6 and entered in the record without objection. Applicant testified, called no witnesses, and introduced eight exhibits, which were identified and marked as Applicant's Ex. A through H and entered in the record without objection. The Defense Office of Hearings and Appeals (DOHA) received the hearing transcript (Tr.) on December 11, 2012.

Findings of Fact

The SOR contains nine allegations of financial conduct that raise security concerns under Guideline F, Financial Considerations (SOR ¶¶ 1.a. through 1.i.) In his Answer to the SOR, Applicant admitted the allegations at ¶¶ 1.a., 1.b., 1.c., 1.d., 1.g., 1.h., and 1.i. He denied the allegations at SOR ¶¶ 1.e. and 1.f. Applicant's admissions are entered as findings of fact.

Applicant is 37 years old. He has never been married, and he has no dependents. He is employed as a functional analyst by a government contractor, and he seeks a security clearance for the first time. (Ex. 1; Tr. 53-54.)

Applicant attended college from 2003 until 2004. From 2000 until October 2007, he was employed as a real estate agent. Between 2000 and 2004, Applicant's estimated income was approximately \$100,000 a year. The SOR alleges at ¶¶ 1.a. and 1.c. that Applicant failed to file federal income tax returns and state income tax returns in his state of residence in 2005, 2006, and 2007. Applicant stated that he failed to file federal and state income tax returns because, as a real estate agent, his income was affected by the downturn in the housing market, and he did not have sufficient money to pay his taxes. He believed that if he lacked the money to pay his federal and state income taxes, he was not required to file. He stated that his yearly income dropped from \$100,000 a year to \$50,000 a year in about 2005 and thereafter.¹ (Answer to SOR; Ex. 1; Ex. 2; Ex. 3; Tr. 36-37, 52.)

The SOR alleges at ¶ 1.b. that Applicant owes the Internal Revenue Service (IRS) \$67,360 for unpaid federal taxes for tax years 2005, 2006, and 2007. The SOR alleges at ¶ 1.d that Applicant owes his state of residence \$15,586 for unpaid state income taxes for tax years 2005, 2006, and 2007. In a March 19, 2012, response to DOHA interrogatories, Applicant stated that he had filed his federal and state tax returns and was awaiting confirmation that they had been received by the taxing authorities. However, at his hearing he stated that he had his federal and state tax returns prepared and ready to file but had not yet filed them. He further explained that he was attempting to sell his home by short sale and felt he should address that issue first. (Ex. 2; Tr. 40-42.)

¹ In 2005, in managing his financial obligations, Applicant used 2005 income to pay his 2004 federal income taxes. (Tr. 37.)

During his time as a real estate agent, Applicant purchased a condominium apartment. The SOR alleges at ¶ 1.g. that Applicant is past due \$271 on a home equity line of credit with a balance of approximately \$19,944. The SOR alleges at ¶ 1.h. that Applicant is past due \$3,464 on a home equity line of credit with a balance of approximately \$27,288. Both lines of credit are held by the same creditor. Applicant stated that the creditor had verbally agreed, upon completion of the short sale, to accept approximately \$42,000 in settlement of the two delinquent debts. Applicant anticipated that his monthly payment to the creditor would be between \$500 and \$600. (Tr. 32-33, 42-43.)

The SOR also alleges at ¶ 1.i. that Applicant owes \$12,868 on a delinquent first mortgage on the property with a balance of approximately \$112,000. At his hearing Applicant provided documentation establishing that the holder of the first mortgage had approved a short sale of the property. He also provided a document showing that buyers had signed a residential contract of sale on the property and had offered to purchase the property for \$145,000. At his hearing, Applicant stated that he had also signed the contract, although his signature was not on the document he provided. (Ex. G; Ex. H; Tr. 43-45.)

In October 2007, Applicant took a position with a government contractor and served overseas. With a few short breaks for vacations in 2007 and 2009, Applicant worked overseas until July 2010. His yearly pay was approximately \$120,000.² During that time, he did not rent his condominium, and it stood empty. He continued making most of his mortgage payments, however. (Tr. 39-40.)

In 2009, while he was overseas, Applicant filed and paid his 2008 federal income tax. He used a computer software program that was available to him in the country where he was working. The SOR also alleges at ¶ 1.a. that Applicant failed to file federal income tax returns in 2009 and 2010. In response to DOHA interrogatories in March 2012, Applicant stated he had not filed his 2009 and 2010 federal income taxes but planned to do so. At his hearing, Applicant stated that he hired a firm to help him with his tax delinquencies when he returned to the United States in 2010, but the firm was not helpful. He stated that he paid the firm approximately \$3,500. Applicant has not yet contacted the IRS to arrange payment of his tax delinquencies. He intends to write a hardship letter to the IRS, explain his overseas employment, and request a reduction in the amount he will owe. (Ex. 2; Tr. 34-38, 63-64.)

Applicant denied the allegation at SOR ¶ 1.e. stating that he failed to file state income tax returns in State B for tax years 2009 and 2010. He stated that he was a resident of State A during the years he was employed overseas. He acknowledged that he became a resident of State B in August 2010. He failed to explain why he did not file a state income tax return for the four months in 2010 when he was a resident of State B. (Answer to SOR.)

² Applicant did not have a clear understanding of his employment status when serving overseas. He believed he was an employee. (Tr. 55-62.)

Applicant also denied the allegation at SOR ¶ 1.f. which stated that he owed a telecommunications company a debt of \$1,482. In his answer to the SOR, Applicant stated that he believed he paid the debt in 2009. He further stated that he would visit the office of the creditor at a future time and seek clarification of the debt. Applicant's credit reports of January 2011, January 2012, and November 2012 list the debt as in collection status and unpaid. (Answer to SOR; Ex. 4; Ex. 5; and Ex. 6.)

In his March 2012 response to DOHA interrogatories, Applicant stated that he was contemplating bankruptcy. In a statement attached to his response to the SOR, he stated he would seek bankruptcy protection if the short sale of his condominium is not completed. At his hearing, he confirmed that he was still considering filing for bankruptcy. (Ex. A; Ex. 2; Tr. 33-34.)

Applicant's current annual salary is \$65,000. He acknowledged that if he pays \$500 to \$600 a month to the creditor on his two home equity debts, he would not be in position to agree to a payment plan with the IRS on his federal tax delinquencies. (Tr. 48-49.)

Applicant is seeking to enhance his income by working as a bartender. He provided letters of reference from individuals with whom he worked overseas and after his return to the United States. The individuals praised Applicant's technical skills and work ethic. Applicant has not had financial credit counseling. (Ex. 3; Ex. A; Ex. D; Ex. E; Ex.F; Tr. 50-51.)

Policies

The U.S. Supreme Court has recognized the substantial discretion of the Executive Branch in regulating access to information pertaining to national security, and it has emphasized that "no one has a 'right' to a security clearance." *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). As Commander in Chief, the President has the authority to control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to have access to such information." *Id.* at 527. The President has authorized the Secretary of Defense or his designee to grant applicants 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 and modified.

When evaluating an applicant's suitability for a security clearance, an administrative judge must consider and apply the revised adjudicative guidelines (AG). 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, the administrative judge applies these guidelines 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, the applicant is responsible for presenting “witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel. . . .” The applicant has the ultimate burden of persuasion in seeking to obtain 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 the 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.

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.

The guideline notes several conditions that could raise security concerns in this case. Under AG ¶ 19(a), an “inability or unwillingness to satisfy debts” is potentially disqualifying. Under AG ¶ 19(c), “a history of not meeting financial obligations” may raise security concerns. Additionally, under AG ¶ 19(g), “failure to file annual federal, state or local income tax returns as required or the fraudulent filing of the same” raises security concerns. Applicant accumulated substantial delinquent debt and was unable or unwilling to pay his creditors. He failed to file federal income tax returns for tax years 2005, 2006, 2007, 2009, and 2010. He also failed to file state income tax returns for his state of residence in 2005, 2006, and 2007. He also failed to file a state income tax return when he resided in State B for four months in 2010. This evidence is sufficient to raise these potentially disqualifying conditions.

The guideline also includes examples of conditions that could mitigate security concerns arising from financial difficulties. Several Guideline F mitigating conditions could apply to the security concerns raised by Applicant’s financial delinquencies. Unresolved financial delinquency might be mitigated if it “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.” (AG ¶ 20(a)) Additionally, unresolved financial delinquency might be mitigated if “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.” (AG ¶ 20(b)) Still other mitigating circumstances that might be applicable include evidence that “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” (AG ¶ 20(c)) or “the individual has initiated a good-faith effort to repay overdue creditors or otherwise resolve debts.” (AG ¶ 20(d)) Finally, if “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 options to resolve the issue,” then AG ¶ 20(e) might apply.

Applicant admitted a history of financial difficulties and inattention to his financial responsibilities over a period of several years. His income declined in 2006 when the real estate market underwent a downturn. In 2007, he began work for a government contractor overseas, with an estimated annual salary of \$120,000. Despite his higher income, Applicant did not file his federal income tax returns for 2005, 2006, 2007, 2009, and 2010. He also did not file his state income tax returns for 2005, 2006, 2007, and part of 2010. Applicant’s federal and state tax returns for those years remained unfiled as of the date of his hearing in December 2012. While Applicant suffered a decline in income in 2006 and 2007 that was beyond his control, he did not act responsibly under the circumstances.

While he was employed as a real estate agent, Applicant purchased a condominium apartment. Applicant became delinquent in paying his first mortgage on the property and two home equity loans attached to the property. While Applicant, to his credit, attempted to resolve his delinquencies through a short sale of the condominium, it was unclear at the time of his hearing that the short sale would be completed. Because of this uncertainty, Applicant was also contemplating filing for bankruptcy. He acknowledged that he lacked sufficient resources from his current annual salary of \$65,000 to pay the creditor holding his two delinquent home equity loans and to commit to a plan with the IRS to pay his delinquent federal income taxes.

Applicant's unresolved federal and state income tax debts total approximately \$83,000. Additionally, if the short sale of his condominium occurs, Applicant will owe an additional \$42,000 to the creditor holding his delinquent home equity loans. The record reflects that Applicant lacks the financial resources at the present to resolve these delinquencies, and at the time of his hearing, he had no definite plans in place to satisfy them. Applicant's financial situation reflects multiple unresolved debts which remain unsatisfied and which have occurred under circumstances that are likely to recur.

Applicant's financial picture was also clouded by his continuing assertions that he planned to seek protection from his creditors by declaring bankruptcy. While bankruptcy is a legitimate legal tool in the resolution of debt, it does not erase concerns about an individual's good-faith efforts to satisfy his creditors and demonstrate current and future financial stability.

DOHA's Appeal Board has explained what constitutes a "good-faith" effort to repay overdue creditors or otherwise resolve debts:

In order to qualify for application of [the "good-faith" mitigating condition], an applicant must present evidence showing either a good-faith effort to repay overdue creditors or some other good-faith action aimed at resolving the applicant's debts. The Directive does not define the term "good-faith." However, the Board has indicated that the concept of good-faith 'requires a showing that a person acts in a way that shows reasonableness, prudence, honesty, and adherence to duty or obligation.' Accordingly, an applicant must do more than merely show that he or she relied on a legally available option (such as bankruptcy) in order to claim the benefit of [the "good-faith" mitigating condition.]

(ISCR Case No. 02-30304 at 3 (App. Bd. April 20, 2004) (quoting ISCR Case No. 99-9020 at 5-6 (App. Bd. June 4, 2001))).

For many years, Applicant was inattentive to his financial responsibilities. He failed to address his delinquent debts and to demonstrate that he had made good-faith efforts to satisfy them. Moreover, Applicant has not had financial counseling, and there is no evidence that his financial situation is under control. I conclude that AG ¶¶ 20(a), 20(b), 20(c), 20(d), and 20(e) do not apply in mitigation in Applicant's 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 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.

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. Applicant is a mature person of 37 years. As a real estate agent and as the employee of a government contractor, he has, at various times, earned a high income. His financial problems began several years ago when there was a downturn in the real estate market. However, Applicant has failed to take a comprehensive interest in resolving his tax and real property obligations. His current financial situation remains uncertain and unresolved. At his hearing, he stated that his federal tax returns for 2005, 2006, 2007, 2009, and 2010 had not yet been filed. He stated that he would file his federal and state returns and satisfy other delinquent debts in the future. His failure to act in good faith to carry out his financial obligations continues to raise security concerns about his judgment and reliability.

Overall, the record evidence leaves me with questions and doubts about Applicant's eligibility and suitability for a security clearance. For these reasons, I conclude Applicant failed to mitigate the security concerns arising from his financial delinquencies.

Formal Findings

Formal findings for or against Applicant on the allegations set forth in the SOR, as required by section E3.1.25 of Enclosure 3 of the Directive, are:

Paragraph 1, Guideline F:	AGAINST APPLICANT
Subparagraphs 1.a. - 1.i.:	Against 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.

Joan Caton Anthony
Administrative Judge