



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



In the matter of:)
)
-----) ISCR Case No. 11-07752
)
Applicant for Security Clearance)

Appearances

For Government: Braden M. Murphy, Esq., Department Counsel
For Applicant: *Pro se*

01/08/2013

Decision

HARVEY, Mark, Administrative Judge:

Applicant’s statement of reasons (SOR) alleges 11 delinquent debts, totaling \$57,932. He placed six SOR debts into a debt consolidation plan (DCP). He did not timely file his federal tax returns for 2005 to 2010, and he owes the Internal Revenue Service (IRS) about \$31,000. He also owes a 2009 state tax debt of \$2,072. Financial considerations are not mitigated. Eligibility for access to classified information is denied.

Statement of the Case

On February 10, 2011, Applicant submitted an Electronic Questionnaires for Investigations Processing (e-QIP) or security clearance application (SF 86) (GE 1). On July 18, 2012, the Department of Defense (DOD) issued an SOR to Applicant, pursuant to Executive Order 10865, *Safeguarding Classified Information Within Industry*, dated February 20, 1960, as amended; Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), dated January 2, 1992, as amended; and the adjudicative guidelines (AG) promulgated by the President on December 29, 2005.

The SOR alleged security concerns under Guideline F (financial considerations). (Hearing Exhibit (HE) 2) The SOR further informed Applicant that, based on information available to the Government, DOD adjudicators could not make the preliminary

affirmative finding that it is clearly consistent with the national interest to grant or continue Applicant's security clearance, and it recommended that his case be submitted to an administrative judge for a determination whether his clearance should be granted, continued, denied, or revoked. (HE 2)

On August 29, 2012, Applicant responded to the SOR and requested a hearing. (HE 3) On November 8, 2012, Department Counsel was ready to proceed on Applicant's case. On November 19, 2012, Applicant's case was assigned to me. On November 27, 2012, the DOD Hearings and Appeals Office issued a hearing notice, setting the hearing for December 19, 2012. (HE 1) Applicant's hearing was held as scheduled. At the hearing, Department Counsel offered four exhibits, and Applicant offered two exhibits. (Tr. 14-15; GE 1-4; AE A, B) There were no objections, and I admitted GE 1-4 and AE A, B. (Tr. 14-16) On December 28, 2012, I received the transcript of the hearing. Applicant did not provide any post-hearing evidence.

Findings of Fact¹

In his Answer to the SOR, Applicant accepted responsibility for the debts in SOR ¶¶ 1.b to 1.k. (HE 3) He indicated the debt in SOR ¶ 1.b for \$7,084 was included in the debt in SOR ¶ 1.k for \$41,912, the debt in SOR ¶ 1.i for \$81 would be paid on September 13, 2012, and the debt in SOR ¶ 1.a for \$2,072 was paid. (HE 1) The non-tax debts were consolidated into a debt consolidation plan. (HE 3) His admissions are accepted as findings of fact.

Applicant is a 56-year-old principal field engineer for a defense contractor. (Tr. 5, 17; GE 1) In 1974, he graduated from high school. (Tr. 20) He achieved some educational and training certifications while serving on active duty and working for companies. (Tr. 6) He has not attended college. (Tr. 5) He has two children from before his first marriage. (Tr. 23) He married in 1979, and in 2008, he divorced. (Tr. 23; GE 1) He has two children from his first marriage, who are 28 years old and 32 years old. (Tr. 22) In 2009, he married. (Tr. 23; GE 1) His spouse is a beautician, and she lives in a different state from Applicant. (Tr. 23) He does not have any children with his current spouse. (Tr. 23-24)

Applicant served on active duty in the Army for 22 years and retired as a sergeant first class in 1996. (Tr. 6, 17) While in the Army, he held several military occupational specialties (MOS) in communications. (Tr. 6) He served overseas in Germany, South Korea, Saudi Arabia, Kuwait, and Panama. (Tr. 7) His service in Southwest Asia was for Operations Desert Shield and Desert Storm. (Tr. 7) He held a Top Secret clearance while in the Army, and he has not held a security clearance since leaving active duty. (Tr. 7, 17)

¹To protect Applicant's right to privacy, some details have been excluded. Specific information is available in the cited exhibits.

Financial Considerations

Applicant was unemployed in 2002; he worked for a corporation from 2002 to 2008; he was unemployed for two months in 2008; he worked for another corporation for six months; and in November 2008, he began working for his current employer. (Tr. 19-20) He has been working full time since November 2008. (Tr. 21) His current base salary is \$71,000. (Tr. 20)

Applicant's credit reports, SOR, and March 8, 2011 Office of Personnel Management (OPM) personal subject interview (PSI) discuss 11 delinquent debts, totaling \$57,932.

Applicant and his first wife disagreed with how their federal tax returns should be filed. (Tr. 24) There were disputes about filing joint or separate tax returns and who should take deductions. (Tr. 24) Applicant is currently on a payment plan to the Internal Revenue Service (IRS) of \$450 per month. (Tr. 25) The IRS payment plan began in June of 2012. (Tr. 26)

SOR ¶ 1.a alleges Applicant owed \$2,072 to state tax authority S for a state tax lien filed in September 2009. S contended that he owed state taxes for 2005. (Tr. 26) Applicant disputed the debt, indicating he paid state income taxes to state tax authority W, the location where he lived. (Tr. 26-27) He contended that S should have given him a credit for taxes paid to W. (Tr. 26-27) He learned on December 18, 2012, the day before his hearing, the basis for S's claim of taxes owed. (Tr. 28) He did not submit documentation to S disputing the debt. (Tr. 28)

On October 18, 2006, Applicant filed his tax return for 2005. (AE B at 2) On December 13, 2010, Applicant filed his tax returns for 2006 to 2009. (AE B at 5, 7, 9, 11) On March 2, 2012, Applicant filed his tax return for 2010. (AE B at 13) On April 15, 2012, he filed his federal tax return for 2011. (Tr. 36) He said he knew he owed on his taxes, and he did not timely file his tax returns because he didn't have the money to pay his taxes. (Tr. 41)

On March 8, 2011, Applicant told an OPM investigator that he owed the IRS: \$8,364 for 2006; \$2,854 for 2007; \$4,058 for 2008; and \$4,643 for 2009, for a total of \$19,919. (GE 4 at 126) In December 2010, he submitted a payment plan to the IRS, offering to pay \$250 per month. (GE 4 at 126)

In March and April 2012, the IRS levied \$4,842 from Applicant's pay. (AE B at 4) After an initial payment of \$1,461 on March 5, 2012, the IRS was garnishing \$1,000 per month from his pay. (AE B at 4) On April 24, 2012, Applicant established an IRS installment agreement whereby he would pay \$450 per month. (AE B at 4) He began making the agreed upon payments on September 2012. (AE B at 4) SOR ¶ 1.k alleges that Applicant owes the IRS \$41,912 based on a federal tax lien. (Tr. 40; GE 2 at 74; GE 4 at 126) On April 17, 2012, Applicant filed amended tax returns for 2008 to 2011, deducting alimony paid to his former spouse. (Tr. 39) On July 2, 2012, the IRS granted him a \$1,575 credit for tax year 2008, a \$2,972 credit for tax year 2009, and a \$3,024

credit for tax years 2010 and 2011. (AE B at 10, 12, 14, 16; Tr. 39-40) He also received some reduced or removed penalties. (AE B at 10, 12, 14, 16; Tr. 39-40) His December 18, 2012 IRS tax transcripts for 2005 to 2011 provide the following information:

Tax Year	Adjusted Gross Income	Tax Owed	Page Cites in Ex. B
2005	\$78,508	\$3,759	2
2006	\$81,504	\$14,828	5
2007	\$85,114	\$4,884	7
2008	\$72,874	\$3,652	9
2009	\$76,102	\$2,368	11
2010	\$81,363	\$2,205	13
2011	\$86,622	\$806	15
Total		\$32,502²	

On June 11, 2012, Applicant established a debt consolidation program (DCP), which will address 12 of his debts. He pays \$200 monthly into his DCP. (AE A) His DCP will address the debts in SOR ¶¶ 1.c (\$969), 1.e (\$1,693), 1.f (\$1,133), 1.g (\$270), 1.h (\$1,545), and 1.j (\$191), as well as several other non-SOR delinquent debts. (AE A) The name of the creditor and the amount of the debt do not match the debts in SOR ¶¶ 1.d (\$982) and 1.i (\$81). (Tr. 41-42; AE A) He offered to add the two missing debts to his DCP. (Tr. 43) Aside from his initiation of the DCP, which paid one non-SOR debt for \$850 (settled for \$450), he did not make any payments to the SOR creditors. (Tr. 30) He believed all of his creditors were included in the DCP. (Tr. 30)

Applicant's personal financial statement (PFS) includes his \$450 monthly payment to the IRS and his \$200 monthly payments to the DCP. (GE 4 at 124) He has a monthly net remainder of \$48. (GE 4 at 124) Applicant said "basically right now my paycheck doesn't really get me through a pay period." (Tr. 33) Sometimes he is unable to pay for utilities or cable. (Tr. 34) He does not have a savings account, and he has about \$300 in his checking account. (Tr. 34) He recently purchased another vehicle, and he will have a \$230 monthly vehicle payment on a \$5,000 loan. (Tr. 35, 43)

Applicant has not had credit counseling. (Tr. 49) He attributes his financial problems to having to support three households: he has to pay his first wife \$900 per month in alimony; his second wife lives in another state; and he has his own apartment. (Tr. 36)

Policies

The U.S. Supreme Court has recognized the substantial discretion of the Executive Branch in regulating access to information pertaining to national security emphasizing, "no one has a 'right' to a security clearance." *Department of the Navy v.*

²Applicant's December 18, 2012 IRS transcript does not include a cumulative total of the amount owed the IRS. (AE B) Applicant believes he owes the IRS about \$31,000. (Tr. 40)

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 applicant’s 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.

Eligibility for a security clearance is predicated upon the applicant meeting the criteria contained in the adjudicative guidelines. These guidelines 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 overarching 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.

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 the applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation about 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), § 3.1. Thus, nothing in this Decision should be construed to suggest that I have based this decision, in whole or in part, on any express or implied determination about applicant’s allegiance, loyalty, or patriotism. It is merely an indication the applicant 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 therein 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 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

Financial Considerations (Guideline F)

AG ¶ 18 articulates the security concern relating to financial problems:

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 provides three disqualifying conditions that could raise a security concern and may be disqualifying in this case: “(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.” In ISCR Case No. 08-12184 at 7 (App. Bd. Jan. 7, 2010), the Appeal Board explained:

It is well-settled that adverse information from a credit report can normally meet the substantial evidence standard and the government’s obligations under [Directive] ¶ E3.1.14 for pertinent allegations. At that point, the burden shifts to applicant to establish either that [he or] she is not responsible for the debt or that matters in mitigation apply.

(internal citation omitted). Applicant’s history of delinquent debt is documented in his credit reports, his SF 86, his OPM interview, his SOR response, and his statement at his hearing.

Applicant’s SOR alleges 11 delinquent debts, totaling \$57,932. He placed six SOR debts into a DCP. He did not timely file his federal tax returns for 2005 to 2010,³

³ 26 U.S.C. § 7203 provides:

Any person required under this title to pay any estimated tax or tax, or required by this title or by regulations made under authority thereof to make a return, keep any records, or supply any information, who willfully fails to pay such estimated tax or tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than \$25,000 (\$100,000 in the case of a corporation), or imprisoned not more than 1 year, or both, together with the costs of prosecution. In the case of any person with respect to whom there is a failure to pay any estimated tax, this section shall not apply to such person with

and he owes the IRS about \$31,000. He also owes a 2009 state tax debt of \$2,072. The Government established the disqualifying conditions in AG ¶¶ 19(a), 19(c), and 19(g) requiring additional inquiry about the possible applicability of mitigating conditions.

Five mitigating conditions under AG ¶ 20 are potentially applicable:

(a) the behavior happened so long ago, was so infrequent, or occurred under such circumstances that it is unlikely to recur and does not cast doubt on the individual's current reliability, trustworthiness, or good judgment;

(b) the conditions that resulted in the financial problem were largely beyond the person's control (e.g., loss of employment, a business downturn, unexpected medical emergency, or a death, divorce or separation), and the individual acted responsibly under the circumstances;

(c) the person has received or is receiving counseling for the problem and/or there are clear indications that the problem is being resolved or is under control;

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

(e) the individual has a reasonable basis to dispute the legitimacy of the past-due debt which is the cause of the problem and provides documented proof to substantiate the basis of the dispute or provides evidence of actions to resolve the issue.

None of the mitigating conditions fully apply to all of Applicant's SOR debts and his failure to timely file his federal tax returns. The non-tax debts in SOR ¶¶ 1.c to 1.j are mitigated because Applicant established a DCP, and he made several payments into the DCP. He credibly stated that he would add the two missing SOR debts into the DCP. The debt in SOR ¶ 1.b, a federal tax debt for \$7,084, is mitigated because it is included in the federal tax debt of \$41,912 in SOR ¶ 1.k. All of his federal tax debts are now consolidated into his IRS installment agreement.

Even though Applicant was aware that he owed the IRS a significant amount of money, he did not make any progress paying this debt until the IRS started garnishing

respect to such failure if there is no addition to tax under section 6654 or 6655 [26 USCS § 6654 or 6655] with respect to such failure.

Applicant has not been charged with violating 26 U.S.C. § 7203. The SOR did not allege a security concern under Guideline J (criminal conduct), and no adverse inference is made against Applicant for his possible violation of 26 U.S.C. § 7203.

his pay.⁴ In March and April 2012, the IRS levied \$4,842 from Applicant's pay. After an initial payment of \$1,461 on March 5, 2012, the IRS was garnishing \$1,000 per month from his pay. On April 24, 2012, he established an IRS installment agreement, and he agreed to pay \$450 per month. He began making the agreed upon IRS payments in September 2012. Applicant did not receive financial counseling. Applicant is living paycheck to paycheck, and he will soon have a car payment that he cannot afford. This car payment, if made, will jeopardize his payment plans.

Applicant attributes his financial problems to brief periods of unemployment several years ago, his separation from his family, his establishment and maintenance of multiple households, and his divorce. These were circumstances largely beyond Applicant's control.

Applicant did not establish that he acted in good faith to resolve his delinquent SOR debts.⁵ From 2005 to 2011, his income ranged from \$72,874 (2008) to \$86,622 (2011). He had the means to make more progress resolving his delinquent federal tax debts. He did not prove that he maintained contact with most of his SOR creditors,⁶ and he did not prove that he made sufficient attempts to timely establish his payment plan with the IRS or with state tax authority S (SOR ¶ 1.a). He did not establish "there are clear indications that the problem is being resolved or is under control." He did not prove that he acted responsibly under the circumstances.

Applicant's most significant Guideline F problem is his failure to timely file his federal tax returns. On December 13, 2010, Applicant filed his tax returns for 2006 to 2009. On March 2, 2012, Applicant filed his tax return for 2010. From December 2010 to

⁴See ISCR Case No. 08-06059 at 6 (App. Bd. Sept. 21, 2009) (indicating involuntary payment of debts through garnishment is not necessarily mitigating).

⁵The Appeal Board has previously 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].

(internal citation and footnote omitted) ISCR Case No. 02-30304 at 3 (App. Bd. Apr. 20, 2004) (quoting ISCR Case No. 99-9020 at 5-6 (App. Bd. June 4, 2001)).

⁶Even if Applicant's financial difficulties initially arose, in whole or in part, due to circumstances outside his [or her] control, the Judge could still consider whether Applicant has since acted in a reasonable manner when dealing with those financial difficulties." ISCR Case No. 05-11366 at 4 n.9 (App. Bd. Jan. 12, 2007) (citing ISCR Case No. 99-0462 at 4 (App. Bd. May 25, 2000); ISCR Case No. 99-0012 at 4 (App. Bd. Dec. 1, 1999); ISCR Case No. 03-13096 at 4 (App. Bd. Nov. 29, 2005)). A component is whether he or she maintained contact with creditors and attempted to negotiate partial payments to keep debts current.

April 2012, he failed to take reasonable action in a timely fashion to resolve his delinquent taxes. AG ¶ 20(e) is not fully applicable. Applicant did not provide documentation showing he was disputing the state tax debt in SOR ¶ 1.a for \$2,072.

In sum, Applicant has not provided enough evidence to establish that additional delinquent debt is unlikely to recur. His track record of financial responsibility shows insufficient effort, good judgment, trustworthiness, and reliability to warrant mitigation of financial considerations concerns. It is likely that his financial problems will continue.

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 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 my comments under Guideline F in my whole-person analysis. Some of the factors in AG ¶ 2(a) were addressed under Guideline F, but some warrant additional comment.

Although the rationale for reinstating Applicant's clearance is insufficient to support a security clearance at this time, there are several factors tending to support reinstatement of his access to classified information. He is a 56-year-old principal field engineer for a defense contractor. He is a high school graduate who achieved some educational and training certifications while serving on active duty and working for companies. He has four adult children. He served on active duty in the Army for 22 years and retired as a sergeant first class in 1996. He served overseas in Germany, South Korea, Saudi Arabia, Kuwait, and Panama. His service in Southwest Asia was for Operations Desert Shield and Desert Storm. He held a Top Secret clearance while in the Army, and he has not held a security clearance since leaving active duty. There is no evidence of any security violations. Circumstances largely beyond Applicant's control adversely affected his finances, including establishing and maintaining three households, separations, a divorce, and brief periods of unemployment several years ago. He is sufficiently mature to understand and comply with his security responsibilities. He recently began a DCP, which will resolve all of his delinquent, non-tax debts. He began making payments on a payment plan that is satisfactory to the IRS

in September 2012. He is an asset to his company and his family. He deserves substantial credit for volunteering to support the U.S. Government as an employee of a defense contractor and for his years of active duty Army service. There is every indication that he is loyal to the United States and his employer. These factors show some responsibility, rehabilitation, and mitigation.

The whole-person factors against reinstatement of Applicant's clearance are more substantial. He is an intelligent person, and his failure to timely file his federal tax returns from 2005 to 2010 was irresponsible. Year after year he had an opportunity to comply with statutory federal tax requirements, and he knowingly chose not to do so. He had the ability and resources to make greater progress resolving his tax debts. He did not resolve his 2009 state tax lien. His PFS shows he is living paycheck to paycheck. Nevertheless, he recently purchased a vehicle, which may place his other payment plans in jeopardy. There is an insufficient track record of SOR debt payment. There are not "clear indications that the problem is being resolved or is under control." He did not prove that he acted responsibly with respect to his debts under the circumstances. Financial considerations security concerns are not fully mitigated at this time.

I have carefully applied the law, as set forth in *Department of Navy v. Egan*, 484 U.S. 518 (1988), Exec. Or. 10865, the Directive, and the AGs, to the facts and circumstances in the context of the whole person. Financial considerations concerns are not fully mitigated, and eligibility for access to classified information is denied.

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:	Against Applicant
Subparagraphs 1.b to 1.j:	For Applicant
Subparagraph 1.k:	Against Applicant

Conclusion

In light of all the circumstances presented by the record in this case, it is not clearly consistent with the national interest to continue Applicant's eligibility for a security clearance. Eligibility for a security clearance is denied.

MARK HARVEY
Administrative Judge