



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



In the matter of:)
)
-----) ISCR Case No. 11-08953
)
Applicant for Security Clearance)

Appearances

For Government: Fahryn Hoffman, Esquire, Department Counsel
For Applicant: *Pro se*

05/29/2013

Decision

GALES, Robert Robinson, Administrative Judge:

Applicant failed to mitigate the security concerns regarding financial considerations. Eligibility for a security clearance and access to classified information is denied.

Statement of the Case

On April 4, 2011, Applicant applied for a security clearance and submitted an Electronic Questionnaire for Investigations Processing (e-QIP) version of a Security Clearance Application (SF 86).¹ On an unspecified date, the Department of Defense (DOD) issued him a set of interrogatories. He responded to the interrogatories on August 29, 2012.² On October 15, 2012, the DOD issued a Statement of Reasons (SOR) to him, pursuant to Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended and modified; Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended and modified (Directive); and the *Adjudicative*

¹ Item 4 (SF 86), dated April 4, 2011.

² Item 8 (Applicant's Answers to Interrogatories, dated August 29, 2012).

Guidelines for Determining Eligibility For Access to Classified Information (December 29, 2005) (AG) applicable to all adjudications and other determinations made under the Directive, effective September 1, 2006. The SOR alleged security concerns under Guideline F (Financial Considerations), and detailed reasons why the DOD adjudicators were unable to find that it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. The SOR recommended referral to an administrative judge to determine whether a clearance should be granted, continued, denied, or revoked.

Applicant received the SOR on October 23, 2012. In a sworn statement, dated November 8, 2012,³ Applicant responded to the SOR allegations and elected to have his case decided on the written record in lieu of a hearing. A complete copy of the Government's file of relevant material (FORM) was provided to Applicant on March 21, 2013, and he was afforded an opportunity, within a period of 30 days after receipt of the FORM, to file objections and submit material in refutation, extenuation, or mitigation. Applicant received the FORM on March 27, 2013, but, as of May 23, 2013, he had not submitted a response to the FORM. The case was assigned to me on May 24, 2013.

Findings of Fact

In his Answer to the SOR, Applicant admitted one (¶ 1.a.) of the two factual allegations pertaining to financial considerations of the SOR. Applicant's admissions are incorporated herein as findings of fact. After a complete and thorough review of the evidence in the record, and upon due consideration of same, I make the following additional findings of fact:

Applicant is a 28-year-old employee of a defense contractor who, since March 2011, has been serving as a quality assurance specialist.⁴ He previously worked for other employers as a restaurant server, freelance writer, scoring evaluator, associate editor, sales associate, student assistant, copy editor, cashier, and sandwich artist.⁵ He is a May 2004 high school graduate and a May 2008 college graduate with a bachelor's degree in journalism.⁶ He has never served in the U.S. military,⁷ and has never been married.⁸ Applicant has never been granted a security clearance.⁹

³ Item 3 (Applicant's Answer to the SOR, dated November 8, 2012).

⁴ Item 4, *supra* note 1, at 15-16.

⁵ Item 4, *supra* note 1, at 16-29.

⁶ Item 4, *supra* note 1, at 13-15.

⁷ Item 4, *supra* note 1, at 31.

⁸ Item 4, *supra* note 1, at 33.

⁹ Item 4, *supra* note 1, at 43.

Financial Considerations

It is unclear when Applicant first started to experience financial difficulties, although there are some indications that those problems may have started as early as 2009 when he failed to file his 2008 federal income tax return. The SOR identified three purportedly continuing delinquencies.

There is a credit card account with a high credit of \$10,040 and an unpaid balance of approximately \$11,500 that was past due, charged off, and placed for collection (SOR ¶ 1.a.).¹⁰ Applicant had used the credit card for routine purchases, but in March 2010, he fell behind in his monthly payments. A collection agent contacted him in February 2011, and a settlement offer was made to Applicant under which the debt (which was then for \$11,202) would be settled for \$6,721, provided Applicant started making payments by April 2011. No agreement was reached because Applicant was unable to pay the required amount.¹¹ The collection agent filed a lawsuit against Applicant, alleging breach of contract, and Applicant's attorney was able to have the suit dismissed on a motion to dismiss when the collection agent failed to appear.¹² Applicant's position is that the creditor has refused to offer him a "reasonable payment plan/settlement offer," and since the negative account information is already on his credit report, he "will be taking no further action in regard to this issue."¹³ Although Applicant had previously indicated he was trying to negotiate affordable terms with the creditor to satisfy the debt,¹⁴ he has submitted no documentation to support his claim, and there is no other evidence that Applicant made any effort to resolve this account. The account remains unresolved.

As noted above, Applicant failed to file his 2008 federal income tax return as required by law (SOR ¶ 1.b.). There is no evidence that the return was filed by the established April 2009 deadline or by any approved deadline extension.¹⁵ Applicant

¹⁰ Item 5 (Combined Experian, TransUnion, and Equifax Credit Report, dated April 14, 2011), at 5; Item 6 (Equifax Credit Report, dated June 17, 2012), at 1; Item 8 (Personal Subject Interview, dated April 20, 2011), at 1; Item 3, *supra* note 3, at 1.

¹¹ Item 8 (Personal Subject Interview), *supra* note 10, at 2.

¹² Item 9 (Letter, dated August 27, 2012); Item 9 (Register of Actions, dated June 15, 2012).

¹³ Item 9 (Letter), *supra* note 12.

¹⁴ Item 8 (Personal Subject Interview), *supra* note 10, at 2.

¹⁵ The willful failure to file return, supply information, or pay tax, is covered by 26 USC § 7203:

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.

claimed that he was employed by a startup company that failed to properly handle payroll and taxes, and that he had been made an independent contractor with a Form 1099 rather than an employee with a W-2. He also disputed the earnings received, as well as an assessment by “someone who reviewed his earnings” that he owed \$1,300 in federal tax, an amount he was unable to pay.¹⁶ Applicant did not identify the individual who furnished that assessment, or indicate that individual’s expertise. In August 2012, 16 months after being interviewed by an investigator from the U.S. Office of Personnel Management (OPM), Applicant filed his federal income tax return for 2008. The return reflected an adjusted gross income of \$9,079. Penalties were assessed for filing a tax return after the due date (\$135), late payment of tax (\$52.60), and interest for late payment (\$52.10).¹⁷ The account has been resolved.

Applicant failed to file his 2009 federal income tax return as required by law (SOR ¶ 1.b.). There is no evidence that the return was filed by the established April 2010 deadline or by any approved deadline extension, another potential violation of 26 USC § 7203. Applicant claimed that his employers failed to furnish him either a Form 1099 or a W-2. He contended that without those documents, he was unable to file his federal income tax return.¹⁸ This account has not been resolved.

In August 2012, Applicant submitted a personal financial statement reflecting a net monthly income of \$2,500. He claimed \$800 in monthly expenses, with zero debt payments or rent payments, leaving \$1,700 for discretionary spending or savings. He also indicated \$6,000 in bank savings.¹⁹ Applicant has never received financial counseling.²⁰

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.”²¹ 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. The President has authorized the Secretary of Defense or his

¹⁶ Item 8 (Personal Subject Interview), supra note 10, at 2.

¹⁷ Item 9 (Account Transcript, dated August 20, 2012); Item 3 (Account Transcript, dated October 14, 2012).

¹⁸ Item 8 (Personal Subject Interview), supra note 10, at 2; Item 9 (Letter, dated August 27, 2012). It should be noted that while the date of this letter is the same as a letter listed in fn. 12, these are two different letters.

¹⁹ Item 9 (Personal Financial Statement, dated August 27, 2012).

²⁰ Item 8 (Personal Subject Interview), supra note 10, at 3.

²¹ *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988).

designee to grant an applicant eligibility for access to classified information “only upon a finding that it is clearly consistent with the national interest to do so.”²²

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

An administrative judge need not view the guidelines as inflexible, ironclad rules of law. Instead, acknowledging 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. 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 meaningful decision.

In the decision-making process, facts must be established by “substantial evidence.”²³ The Government initially has the burden of producing evidence to establish a potentially disqualifying condition under the Directive, and has the burden of establishing controverted facts alleged in the SOR. Once the Government has produced substantial evidence of a disqualifying condition, under Directive ¶ E3.1.15, the applicant has the burden of persuasion to present evidence in refutation, explanation, extenuation or mitigation, sufficient to overcome the doubts raised by the Government’s case. The burden of disproving a mitigating condition never shifts to the Government.²⁴

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 as well. It is because of this special relationship that the Government must be able to repose a high degree of trust and confidence in those 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 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. Furthermore, “security clearance determinations should err, if they must, on the side of denials.”²⁵

²² Exec. Or. 10865, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960), as amended and modified.

²³ “Substantial evidence [is] such relevant evidence as a reasonable mind might accept as adequate to support a conclusion in light of all contrary evidence in the record.” ISCR Case No. 04-11463 at 2 (App. Bd. Aug. 4, 2006) (citing Directive ¶ E3.1.32.1). “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).

²⁴ *See* ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).

²⁵ *Egan*, 484 U.S. at 531

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.”²⁶ 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 as to Applicant’s allegiance, loyalty, or patriotism. It is merely an indication the Applicant has or has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance. In reaching this decision, I have drawn only those conclusions that are reasonable, logical, and based on the evidence contained in the record. Likewise, I have avoided drawing inferences grounded on mere speculation or conjecture.

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. Under AG ¶ 19(a), an *inability or unwillingness to satisfy debts* is potentially disqualifying. Similarly, under AG ¶ 19(c), a *history of not meeting financial obligations* may raise security concerns. In addition, AG ¶ 19(g), *failure to file annual Federal, state, or local income tax returns as required or the fraudulent filing of the same*, may raise security concerns. Applicant failed to file his federal income tax returns for 2008 and 2009, as required by law. He also was unable to initially pay his credit card, but now that he is able to pay it, he has refused to do so. His financial difficulties remain unresolved. AG ¶¶ 19(a), 19(c), and 19(g) apply.

The guideline also includes examples of conditions that could mitigate security concerns arising from financial difficulties. Under AG ¶ 20(a), the disqualifying condition may be mitigated where *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*. Also, under AG ¶ 20(b), financial security concerns may be mitigated where “*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*

²⁶ See Exec. Or. 10865 § 7.

or separation), and the individual acted responsibly under the circumstances. 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 is potentially mitigating under AG ¶ 20(c). Similarly, AG ¶ 20(d) applies where the evidence shows the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts.²⁷

AG ¶¶ 20(a), 20(b), 20(c), and 20(e), do not apply, and AG ¶ 20(d) minimally applies. The nature, frequency, and relative recency of Applicant's continuing financial difficulties since 2009 make it difficult to conclude that it occurred "so long ago" or "was so infrequent." In light of his continuing inability to resolve his 2009 income tax issues and his refusal to resolve the delinquent credit card account without terms more favorable to him, Applicant's financial problems are unlikely to be resolved in the short term, and they are likely to continue. He has never received financial counseling, and his dispute with the credit card creditor is seemingly without a reasonable basis. While Applicant has contended his income tax difficulties were caused by the actions of his employers in either furnishing him a Form 1099 rather than a W-2, or furnishing him neither form, it is difficult to attribute Applicant's failures to file his income tax returns as required by law to conditions that were largely beyond Applicant's control. The responsibility to file is the taxpayer's alone, and Applicant's dispute over correct paperwork is no justification for his failure to file on time. Applicant's eventual filing of his 2008 federal income tax return in 2012, after so much time where little positive efforts were taken, especially since he had sufficient funds to do so, does not qualify as a "good-faith" effort. Accordingly, Applicant failed to mitigate his financial situation, and under the circumstances, his actions cast doubt on his current reliability, trustworthiness, and good judgment.²⁸

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):

²⁷ The 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 [or statute of limitations]) 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)).

²⁸ See ISCR Case No. 09-08533 at 3-4 (App. Bd. Oct. 6, 2010).

(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. Moreover, I have evaluated the various aspects of this case in light of the totality of the record evidence and have not merely performed a piecemeal analysis.²⁹

There is some evidence in favor of mitigating Applicant's conduct: He finally filed his 2008 federal income tax return in 2012.

The disqualifying evidence under the whole-person concept is more substantial. Applicant failed to file his 2008 and 2009 federal income tax returns as required by law. There was no evidence that the returns were filed by the established April deadlines or by any approved deadline extensions. He attributed his income tax difficulties to the actions of his employers in either furnishing him a Form 1099 rather than a W-2, or furnishing him neither form. Applicant's actions were violations of 26 USC § 7203.

Applicant used his credit card, but was eventually unable to maintain his monthly payments. His position with regard to the delinquent credit card is that the creditor has refused to offer him a "reasonable payment plan/settlement offer," and since the negative account information is already on his credit report, he "will be taking no further action in regard to this issue." Applicant could have made some more reasonable timely efforts to file his income tax returns and resolve his delinquent credit card account, but he has not done so. Applicant has demonstrated the absence of a meaningful track record in addressing his delinquent credit card account or his federal income tax return-filing responsibilities. Applicant's actions indicate a lack of judgment, which raises questions about his reliability, trustworthiness and ability to protect classified information. See AG ¶ 2(a)(1) through AG ¶ 2(a)(9).

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:

²⁹ See *U.S. v. Bottone*, 365 F.2d 389, 392 (2d Cir. 1966); See also ISCR Case No. 03-22861 at 2-3 (App. Bd. Jun. 2, 2006).

Paragraph 1, Guideline F:

AGAINST APPLICANT

Subparagraph 1.a:

Against Applicant

Subparagraph 1.b:

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.

ROBERT ROBINSON GALES
Administrative Judge