



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



In the matter of:)	
)	
REDACTED)	ISCR Case No. 11-12537
)	
Applicant for Security Clearance)	

Appearances

For Government: Alison O’Connell, Esq., Department Counsel
For Applicant: Gerald L. Gilliard, Esq.

11/21/2015

Decision

MENDEZ, Francisco, Administrative Judge:

Applicant did not mitigate the security concerns raised by his finances. He has consistently failed to pay his federal taxes over the past decade. His past-due tax debt has risen from nearly \$7,300 in 2007 to approximately \$40,000 today. He failed to demonstrate that he has reformed the poor financial habits that led to his current financial situation. Clearance is denied.

History of the Case

On October 17, 2014, the Department of Defense (DOD) sent Applicant a Statement of Reasons (SOR), alleging that his conduct and circumstances raised security concerns under the financial considerations guidelines.¹ Applicant answered the SOR and requested a hearing to establish his eligibility for continued access to classified information.

¹ This action was taken under Executive Order (E.O.) 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 implemented by DOD on September 1, 2006.

On February 25, 2015, Department Counsel notified the hearing office that the Government was ready to proceed. Applicant's hearing was originally scheduled with the agreement of the parties for May 14, 2015. Applicant's hearing was twice delayed to accommodate his counsel, who took the matter on *pro bono*. Applicant's hearing was ultimately rescheduled for and held on June 19, 2015.²

At hearing, Department Counsel offered Government exhibits (Gx.) 1 – 12.³ Applicant objected to Gx. 5 – 7 on relevancy grounds. The challenged documents are public court records regarding the debts referenced in SOR 1.a – 1.c. Applicant's objection to Gx. 5 – 7 was overruled. He had no further objections and Gx. 1 – 12 were admitted into evidence. (Tr. at 15-17) Applicant testified, called several witnesses, and offered Applicant's exhibits (Ax.) 1 – 5. He requested additional time post-hearing to supplement the record. I granted his request and he submitted Ax. 6 – 9. Applicant's nine exhibits were admitted into evidence without objection.⁴ (Tr. at 18) The transcript (Tr.) was received on June 29, 2015, and the record closed on July 17, 2015.⁵

Findings of Fact

After a thorough review of the pleadings, exhibits, and transcript I make the following findings of fact:⁶

Applicant has a master's degree. He has been selected, attended, and graduated from highly prestigious leadership and management courses. He is highly active in his community, helping underprivileged children. (Tr. at 39-47) Applicant's witnesses testified about his community involvement, as well as his trustworthiness, reliability, and other favorable character traits. (Tr. at 19-37, 120-125)

² Hearing Exhibits (Hx.) I – VI are prehearing correspondence with the parties, Applicant's motions to delay the proceedings, and rulings on the motions.

³ Hx. VII is the Government's edited list of exhibits. Hx. VIII is Department Counsel's discovery letter to Applicant, dated February 15, 2015, forwarding all the exhibits the Government offered at hearing. Hx. XI includes a copy of Gx. 13 for identification, which was not offered, nor considered. (Tr. at 9-11, 17)

⁴ Hx. XI includes copies of exhibits that Applicant indicated he would offer, but were duplicates of documents attached to his Answer. These duplicate documents were marked for identification, but never formally offered. For the sake of completeness and in the event of appellate review, these duplicate documents have been included in the record. (Tr. at 9-11)

⁵ Applicant's counsel filed a post-hearing motion for production of a second copy of Gx. 1 – 12. At hearing, Applicant's counsel confirmed he had received the exhibits (Tr. at 11) and, as noted above, objected to some of the offered exhibits. Department Counsel fully complied with their discovery obligations, as set forth under the Directive, Enclosure 3, ¶ E3.1.11 and scheduling order, Hx. I. Accordingly, Applicant's motion was denied. See Hx. IX (motion and ruling). Applicant's counsel also filed a post-hearing motion for production of the transcript. This motion was rendered moot because counsel received the transcript before the record closed. See Hx. X.

⁶ Applicant's counsel moved post-hearing that I not consider transcript pages 95, line 5, through 109, line 6, because the video teleconference malfunctioned. (Ax. 8) I have granted this request and have not considered transcript pages 95, line 5, through 109, line 6.

Applicant works for a federal contractor. He has been continuously employed since at least 2004. He has held a security clearance since 2008. He was hired by his current employer in January 2014. His tax returns for 2007 to 2011 reflect that his annual gross income increased each year from \$83,000 to over \$130,000. His wife also works full time, with a current annual income of approximately \$60,000. Applicant and his wife file separate tax returns. (Tr. at 47-48, 82-89; Gx. 1 – 2)

In 2010, Applicant submitted a security clearance application (SCA). He listed a delinquent federal tax debt of nearly \$7,300, and noted that he had a payment plan with the IRS to resolve his past-due taxes. Based on the amount listed on the SCA, Applicant was referring to a federal tax lien that was entered against him in November 2007 for past-due taxes for tax years 2005 – 2006. This tax lien is referenced at SOR 1.c, and remains unresolved. (Gx. 1 at 48; Gx. 7).

In January 2011, Applicant sat down for a security clearance background interview. Applicant told the background investigator that the 2007 tax lien was a result of using the money that should have gone to pay his taxes to pay for wedding-related expenses. Applicant also said that he was unable to pay his federal taxes for 2008 and 2009, because he did not have a sufficient amount deducted from his wages. At the time, his past-due tax debt had risen to about \$15,000. (Gx. 1 at 42; Gx. 4 at 13)

In December 2011, the IRS filed a second tax lien against Applicant. This tax lien, which is referenced in SOR 1.b, is for approximately \$23,000 and is for past-due taxes for tax years 2007 – 2010. This tax lien remains unresolved. (Gx. 6)

At hearing, Applicant testified that he owes the IRS for taxes “dating back to 2005.” (Tr. at 55). He entered into his current repayment plan with the IRS in June 2015. He currently owes \$40,000 in past-due taxes for tax years 2005 – 2012 and 2014. He was scheduled to start making \$560 monthly payments in September 2015. Over the past seven years, he has entered into a number of installment agreements with the IRS to resolve his past-due taxes. When he is unable to pay his taxes, Applicant contacts the IRS and negotiates a new installment agreement. (Tr. at 55-59, 75; Gx. 2 – 4; Ax. 5) Some of the tax years for which Applicant is past due are referenced at SOR 1.h – 1.i.⁷

Applicant’s non-tax related delinquent debts are listed at SOR 1.a, judgment for \$3,700; 1.d – 1.e, medical debts totaling approximately \$500; and 1.f – 1.g, student loan collection accounts totaling over \$150,000. Applicant satisfied the judgment and the medical debts. He consolidated his delinquent student loan accounts and, in March 2014, entered into a repayment plan to rehabilitate his accounts. He did not pay the required monthly payments on time as required by the initial repayment plan, and entered into a new repayment plan in November 2014. (Tr. at 50-55, 59-75, 81-89, 94-95; Answer; Ax. 4)

Applicant testified that he does not have any money set aside in savings. (Tr. at 93) He submitted a recent credit report, which reflects a new collection account of over

⁷ The non-alleged tax debts are only being considered in assessing Applicant’s mitigation evidence and whole-person factors.

\$1,400.⁸ (Ax. 1 at 3) After the hearing, he submitted documentation that the new collection account has been resolved and that he received financial counseling. He prepared a budget with the assistance of his financial counselor. The budget shows nearly \$700 in monthly discretionary income to pay unexpected expenses and satisfy debts. The budget does not reflect any payments to the IRS to satisfy the \$40,000 past-due tax debt. (Tr. at 91; Ax. 6 – 7)

Policies

“[N]o one has a ‘right’ to a security clearance.” *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). Individual applicants are eligible for access to classified information “only upon a finding that it is clearly consistent with the national interest” to authorize such access. E.O. 10865, § 2.

When evaluating an applicant’s eligibility, an administrative judge must consider the adjudicative guidelines (AG). In addition to brief introductory explanations, the guidelines list potentially disqualifying and mitigating conditions. The guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, an administrative judge applies the guidelines in a commonsense manner, considering all available and reliable information, in arriving at a fair and impartial decision.

The Government must present evidence to establish controverted facts alleged in the SOR. Directive ¶ E3.1.14. On the other hand, an applicant is responsible for presenting “witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by the applicant or proven by Department Counsel.” Directive ¶ E3.1.15. An applicant has the ultimate burden of persuasion to establish their eligibility.

In resolving the ultimate question regarding an applicant’s eligibility, an administrative judge must resolve “[a]ny doubt concerning personnel being considered for access to classified information . . . in favor of national security.” AG ¶ 2(b). Moreover, recognizing the difficulty at times in making suitability determinations and the paramount importance of protecting national security, the Supreme Court has held that “security clearance determinations should err, if they must, on the side of denials.” *Egan*, 484 U.S. at 531.⁹

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. The Government reposes a high degree of trust and confidence in individuals to whom it grants access to classified information. Decisions include, by necessity, consideration of the possible risk an applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation of potential, rather than actual, risk of compromise of classified information.

⁸ This debt is only being considered in assessing mitigation and whole-person factors.

⁹ See also ISCR Case No. 07-16511 at 3 (App. Bd. Dec. 4, 2009) (“Once a concern arises regarding an Applicant’s security clearance eligibility, there is a strong presumption against the grant or maintenance of a security clearance.”).

Clearance decisions must be made “in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.” E.O. 10865 § 7. Thus, a decision to deny a security clearance amounts to a finding that an applicant, at the time the decision was rendered, did not meet the strict guidelines established for determining eligibility for access to classified information.

Analysis

Guideline F, Financial Considerations

The security concern regarding an individual who fails to pay their financial obligations and incurs delinquent debt is explained at 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. . . .

The security “concern is broader than the possibility that an applicant might knowingly compromise classified information in order to raise money in satisfaction of his or her debts.”¹⁰ The concern also encompasses financial irresponsibility, which may indicate that an applicant would also be irresponsible, unconcerned, negligent, or careless in handling and safeguarding classified information.

Applicant has lived beyond his means for the past decade. Notwithstanding full-time employment over the past 10 years, which has provided him a good salary, he has consistently failed to pay his federal taxes in full. Although Applicant has entered into installment agreements with the IRS to resolve his past-due taxes, his tax debt continues to rise with almost each passing year, as he is unable or unwilling to set aside a sufficient amount to pay his taxes. Applicant’s recent IRS installment agreement reflects he did not pay his 2014 federal taxes in full. His tax year 2014 federal taxes would normally have been due *after* the SOR in this case was issued. Apparently, not even the potential loss of his security clearance can sufficiently motivate Applicant to change his poor financial habits. Accordingly, the record evidence raises the financial considerations security concern and establishes the following disqualifying conditions:

AG ¶ 19(a): inability or unwillingness to satisfy debts;

AG ¶ 19(c): a history of not meeting financial obligations; and

AG ¶ 19(e): consistent spending beyond one's means, which may be indicated by excessive indebtedness, significant negative cash flow, high debt-to-income ratio, and/or other financial analysis.

¹⁰ ISCR Case No. 11-05365 at 3 (App. Bd. May 1, 2012). See also ISCR Case No. 10-00925 at 2 (App. Bd. June 26, 2012).

The guideline also lists the following relevant mitigating conditions that could, either on their own or collectively, mitigate the security concern:

AG ¶ 20(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;

AG ¶ 20(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;

AG ¶ 20(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;

AG ¶ 20(d): the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts; and

AG ¶ 20(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.

Applicant's debts were not incurred under unusual circumstances. Instead, time and again, he made a conscious decision not to save a sufficient amount to pay his taxes. The filing of two tax liens, numerous financial interrogatories sent to him during the course of the current security clearance review, and even the issuance of the SOR did not alter his behavior. The total amount in past-due tax debt has risen from nearly \$7,300 in 2007 to approximately \$40,000 today. AG ¶¶ 20(a) and 20(b) do not apply.

Applicant did satisfy or is paying the non-tax related SOR debts. However, the mitigating value of such debt resolution is undercut by the fact that one of the debts was only paid after the creditor secured a judgment. Furthermore, Applicant's track record in repaying his delinquent student loans does not engender confidence in his ability to responsibly manage his finances going forward. Despite earning a six-figure salary at his current job, Applicant has not set aside any funds in savings. He did receive financial counseling after the hearing, but the budget that he then created does not even list his monthly debt payments to the IRS. In short, Applicant has made some efforts to resolve his financial situation, but it is far too soon to conclude that his overall financial situation is under control. AG ¶¶ 20(c) and 20(d) partially apply.

Whole-Person Concept

Under the whole-person concept, an administrative judge must evaluate an applicant's eligibility for a security clearance by considering the totality of an applicant's

conduct and all the relevant circumstances. An administrative judge should consider the nine factors listed at AG ¶ 2(a). I hereby incorporate my Guideline F analysis. Applicant presented a formidable case in mitigation, not the least of which is his strong record of community service. However, the favorable evidence does not outweigh the serious security concerns raised by his failure to pay his federal taxes. The Appeal Board recently explained the concern regarding an individual who fails to pay their taxes:

A security clearance represents an obligation to the Federal Government for the protection of national secrets. Accordingly failure to honor other obligations to the Government has a direct bearing on an applicant's reliability, trustworthiness, and ability to protect classified information.

ISCR Case No. at 3 (App. Bd. Oct. 9, 2015). Applicant's consistent failure to abide by the obligation of all citizens to pay their taxes raises the concern that he would similarly fail to honor his security obligations.

A security clearance determination is not intended to punish an individual for past conduct. Instead, these decisions serve as predictive judgments regarding an individual's security suitability, where the individual's past conduct is the best indicator of future behavior.¹¹ Here, Applicant failed to demonstrate that he has reformed the manner in which he handles his finances that led to his tax situation. Thus, Applicant's past conduct and present circumstances continue to raise concerns about his suitability for a security clearance. Overall, the record evidence leaves me with doubts about Applicant's eligibility for continued access to classified information.

Formal Findings

Paragraph 1, Guideline F (Financial Considerations):	AGAINST APPLICANT
Subparagraphs 1.a, and 1.d – 1.g:	For Applicant
Subparagraphs 1.b – 1.c, and 1.h – 1.i:	Against Applicant

Conclusion

In light of the record evidence and for the foregoing reasons, it is not clearly consistent with the national interest to grant Applicant continued access to classified information. Applicant's request for a security clearance is denied.

Francisco Mendez
Administrative Judge

¹¹ ISCR Case No. 11-13626 at 3-4 (App. Bd. Nov. 7, 2013). See also, ISCR Case No. 01-25941 at 5 (App. Bd. May 7, 2004) ("Security clearance determinations are not an exact science, but rather predicative judgments about a person's security suitability in light of that person's past conduct and present circumstances.") (citing, *Egan*, 484 U.S. at 528-529).