



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



In the matter of:)
)
) ISCR Case No. 12-00387
)
Applicant for Security Clearance)

Appearances

For Government: Candace L. Garcia, Esquire, Department Counsel
For Applicant: *Pro se*

05/27/2014

Decision

HENRY, Mary E., Administrative Judge:

Based upon a review of the pleadings, exhibits, and testimony, Applicant's eligibility for access to classified information is denied.

Statement of the Case

Applicant completed and certified an Electronic Questionnaire for Investigations Processing (e-QIP) on October 31, 2007. The Department of Defense (DOD) issued Applicant a Statement of Reasons (SOR) on August 15, 2013, detailing security concerns under Guideline F, Financial Considerations. The action was taken 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 For Determining Eligibility for Access to Classified Information* (AG), implemented on September 1, 2006.

Applicant received the SOR on August 26, 2013, and he answered it on September 15, 2013. Applicant requested a hearing before an administrative judge with the Defense Office of Hearings and Appeals (DOHA). Department Counsel was prepared to proceed on January 8, 2014, and I received the case assignment on February 6, 2014. DOHA issued a Notice of Hearing on February 25, 2014, and I convened the hearing as scheduled on March 25, 2014. The Government requested that a letter of rights and obligations, dated December 2, 2013 and mailed to Applicant, be received as hearing exhibit (HE) 1. Applicant did not object, and HE 1 was received in the record. In its case in chief, the Government offered exhibits (GE) marked as GE 1 through GE 9, which were received and admitted into evidence without objection. Applicant testified. He did not submit any exhibits, but referenced the documents attached to his response to the SOR. DOHA received the hearing transcript (Tr.) on April 2, 2014. I held the record open until April 25, 2014, for Applicant to submit additional matters. Applicant did not submit any additional documents. The record closed on April 25, 2014.

Findings of Fact

The SOR alleges that Applicant has not filed his federal and state tax returns since 2008, that he owes unpaid child support, that two state tax liens have been filed against him, that he misused his company credit card, and that he owed approximately \$42,000 in unpaid debts. In his Answer to the SOR, Applicant admitted, with explanation, all the factual allegations in the SOR. His admissions are incorporated herein as findings of fact. He also provided additional information to support his request for eligibility for a security clearance. After a complete and thorough review of the evidence of record, I make the following findings of fact.

Applicant, who is 52 years old, works as an aerospace engineer for a DOD contractor. He began working for his employer in March 1984. During the last 30 years, Applicant has worked on several avionics programs and as a program manager. In 2006, he received a prestigious engineering award from his employer. He has held a security clearance since 1984, without incident. Out of a concern arising from the problems during his divorce proceedings, he asked to be removed from a special program which gave him access to classified and sensitive information.¹

Applicant married in May 1993 and divorced in 2010. He has two sons, ages 19 and 16, and a 14-year-old daughter. His children live with their mother. In 1995, he and his wife purchased a house for \$230,000, and in 2007, they obtained a \$50,000 equity loan on the house. They placed most of this money in a savings account.²

In August 2008, Applicant left home on a two-week business trip. When he returned, he learned that his wife had taken more than \$32,000 from their joint savings

¹GE 1; GE 4; Tr. 27-28.

²GE 1; Tr. 32, 49-50.

account and placed the money in a separate account in her name only. His wife then hired legal counsel and filed for divorce. Applicant remained in the marital home until the first court hearing in October 2008. After the hearing, he moved out of the marital home and rented a property from a cousin of his wife for \$1,600 a month. At the October 2008 hearing and at a subsequent hearing, the court ordered Applicant's wife to return to Applicant one-half of the money she took from their joint account. She has never returned the money.³

Applicant developed a casual on-line dating relationship with a woman after he and his wife separated. In December 2008, he met this woman for dinner. She encouraged him to consume alcohol. He agreed to meet this woman a second time for dinner. When he arrived at the restaurant, the woman was drinking shots of alcohol with a friend. They encouraged him to do the same, and he did. Later, in the evening, the woman and her friend invited him to come to the friend's home to use her jacuzzi. On the way to the friend's house, a county police officer stopped Applicant for speeding and swerving while driving. The police officer smelled alcohol and administered a breathalyzer test. Applicant registered a .13% alcohol level on the test. The police officer charged him with driving under the influence (DUI). The court convicted Applicant of DUI, fined him \$2,200, directed him to attend traffic school, and initially suspended his driver's license. The court later gave him a restricted driver's license, which allowed him to drive to and from work and traffic school. Applicant completed the court requirements, and the court closed his case.⁴

From the time they married through 2007, Applicant and his wife filed joint tax returns each year. Although still legally married, his wife refused to file a joint tax return for the tax years 2008 and 2009 as ordered by the court in their divorce decree. Instead, she filed a separate return, claiming deductions for the three children and mortgage interest. Applicant chose not to file his tax returns separately and has not been able to obtain his wife's cooperation to file jointly. He has not filed his tax returns for the years 2008 and 2009. Because of his wife's actions, he will need to hire an accountant to prepare these taxes.⁵

During his divorce proceedings, Applicant paid temporary family support, which included child support and alimony. By the end of 2009, he estimates that he had overpaid the family support by at least \$5,000. When the court issued the final divorce decree in April 2010, the court directed Applicant to pay \$6,000 a month in family support, which was assessed at \$3,000 a month in alimony for seven and one-half years and \$3,000 a month in child support until each child reached age 18. The family support is deducted as a garnishment from his weekly pay. In 2012, he paid \$1,376 a week for total family support payments that year of more than \$70,000. In 2013, his

³GE 4; GE 5; Tr. 29, 59-63.

⁴GE 4; Tr. 28-29.

⁵GE 5; Tr. 33-35, 68.

weekly family support payment declined to \$1,304. He paid approximately \$67,800 in family support in the year 2013. Applicant advised that he was paying the maximum allowed by law, which was 50% of his net pay after taxes, but before other deductions such as health and life insurance. The court reduced his family support payments in January 2014 to \$4,800 a month. Despite the significant family support payments every month, Applicant has incurred unpaid support obligations totaling approximately \$30,000 because the court ordered payments are higher than the amount which can be garnished from his pay each month.⁶

Applicant hired legal counsel to represent him in his divorce proceedings. By early 2009, he discharged his legal counsel and began representing himself as he did not have sufficient funds to pay his legal fees. At times during his divorce proceedings, he had difficulty accessing his funds because, through her attorney, Applicant's wife would ask the court to freeze his accounts. In 2009, through her attorney, his wife filed contempt charges alleging non-payment of family support. The court dismissed the charges as Applicant was not behind in his family support payments. Applicant believed that he may have overpaid the family support by as much as \$12,000. In 2010, his wife filed a request for a restraining order against Applicant. The court issued a temporary restraining order (TRO) around March 1, 2010. Following a hearing 15 days later, the court dismissed the request for a restraining order.⁷

In March 2010, the family court issued a divorce decree, settling certain matters related to Applicant's divorce. The court, however, retained jurisdiction over custody and visitation. The court awarded Applicant's wife the family home and determined that the \$163,000 mortgage on the property was her sole responsibility. If she sold the house, Applicant would receive \$10,000. Applicant would pay the \$50,000 second mortgage on the marital home. Under the divorce decree, he did not get any payment or credit for equity accrued in the marital home. Applicant received \$20,000 from his wife's Individual Retirement Account (IRA) as well as an equalization sum, unspecified. He would pay any taxes due on the IRA withdrawal. His 401k would be divided equally. Applicant was responsible for payment of a \$13,000 loan against his 401k. Applicant and his wife would be responsible for debts in the sole name of each. Effective January 1, 2010, Applicant would pay \$6,000 a month in family support. All existing arrears in family support through December 31, 2009 were extinguished. The court order did not address the status of any overpayments in family support. The family support payments would be fully deductible for Applicant and fully taxable for his wife. The court also directed that Applicant had the right to claim the two younger children as dependents for tax purposes, and the wife could claim the oldest child. His former wife has refused to complete the necessary tax form for Applicant to claim his younger children as dependents. Finally, as previously indicated, the court directed that the parties file joint

⁶GE 4; GE 5; Tr. 32, 35-36, 44, 71.

⁷GE 4; GE 5; Tr. 28, 61.

tax returns in 2008 and 2009, and thereafter, they file separate tax returns. Applicant's wife continues to restrict his visitation with his children.⁸

In July 2010, Applicant filed a motion to set aside the divorce decree as an illegal judgment. Applicant alleged that his wife's attorney wrote the settlement in favor of his wife and without his agreement or his attorney's agreement. In July 2012, the court denied Applicant's motion after trial. Applicant continues to pursue matters related to his divorce in state court.⁹

In 2011, a local reporter approached Applicant about the DUI he received in December 2008. Based on the information provided to him by the reporter and his own investigation, Applicant determined that he had been the victim of a sting operation. He learned that his wife hired a private detective, who was a former police officer, to help her obtain negative information against Applicant in order to obtain a more favorable divorce settlement. The private detective employed women who approached estranged husbands for the purpose of getting them drunk. Once the estranged husband had consumed sufficient alcohol, these women would invite them to their house to use their jacuzzi or for some other reason. The private detective made arrangements with one or two local on-duty police officers to arrest the estranged husbands as they drove away from the restaurant or bar. The woman Applicant met in 2008 was one of these women. Other men were also arrested in this scheme.¹⁰

In 2011, the local district attorney began an investigation into the activities of the private detective. The district attorney eventually referred the investigation to the United States Justice Department and the Federal Bureau of Investigation (FBI). Applicant cooperated with the FBI. The FBI investigation resulted in a federal indictment of the private investigator on multiple felony charges; the federal indictment of one police officer on multiple felony charges; and the federal indictment of the divorce attorney retained by Applicant's wife on felony charges for income tax evasion, conspiracy, and unlawful interception of communications. In an agreement with the U.S. Attorney, the private investigator pled guilty to multiple felony counts and is now serving eight years in federal prison. Following a trial, the police officer was also found guilty of several felonies, including extortion and honest services fraud, and is currently serving a two-year sentence in a federal prison. His wife's divorce attorney pled guilty to income tax evasion and unlawful interference with communications. She is now serving a two-year sentence in a federal prison, and her license to practice law has been suspended.¹¹

By letter dated April 22, 2011, the county district attorney's office provided Applicant with a copy of the private investigator's statement and transcript pages

⁸GE 6.

⁹GE 4; GE 5.

¹⁰GE 4; Tr. 28-29.

¹¹Response to SOR; GE 5; Tr. 30.

outlining the events leading up to Applicant's DUI arrest. Subsequently, the court granted a petition for *writ of coram nobis*, which set aside Applicant's DUI conviction. The court dismissed Applicant's DUI case and ordered the case sealed. The prosecutor did not object to the petition. In March 2010, the court granted Applicant's request for factual innocence. In July 2012, the FBI notified Applicant that as a victim of a crime involving civil rights and public corruption, he was entitled to available assistance provided to crime victims.¹²

Because of the above investigation, Applicant retained legal counsel, on a contingency basis, to pursue a civil action for violation of his civil rights. Through his counsel, Applicant filed a civil rights action in federal court in April 2012. The federal judge assigned to his case is also assigned to three other cases filed on behalf of individuals harmed by the actions of the private detective, local police, and others. The federal judge stayed the civil action until all the above discussed criminal cases had been completed. In March 2014, the federal judge issued an order permitting discovery to begin in Applicant's civil action. Applicant anticipates that his case will settle within a year and that he will receive a substantial settlement.¹³

Applicant's DUI arrest and divorce action created significant financial problems for him. As a result, he incurred significant unpaid debts between 2008 and 2011 due to loss of income. In addition to not filing his federal and state income tax returns for the years 2008 and 2009, Applicant has not filed income tax returns for the years 2010, 2011, and 2012. At the hearing, he indicated that he had prepared his 2011 income tax returns and that he was working on his 2012 income tax returns. He advised that he wanted a tax accountant to review his federal and state income tax returns before he filed them. He also indicated that he planned to file his federal and state income tax returns for 2011, 2012, and 2013 by the end of June 2014. At this time, he has not provided documentation showing that he filed his past-due federal and state income tax returns. Applicant believes that he will not owe any taxes once he files his tax returns, but acknowledges that he may well owe interest and penalties for his late filings.¹⁴

Applicant has not resolved any of the debts listed in the SOR, even the small debts. He does not intend to file for bankruptcy protection. He plans to pay his outstanding debts with the settlement from his civil action.¹⁵

In 2013, Applicant earned approximately \$187,175 annually. His gross weekly pay totaled \$3,523 and his net weekly pay amounted to \$1,003 after taxes and deductions for insurance, \$200 for a loan payment, and \$1,304 for family support. His income in 2014 is not known, but his weekly family support payments have been

¹²GE 4; GE 5.

¹³GE 5; Tr. 63-65, 86-87, 102-103.

¹⁴Response to SOR; GE 4; Tr. 33-44, 68-70, 77-78.

¹⁵Tr. 66, 74-75.

reduced, at least temporarily. His monthly expenses include \$700 for rent, \$200 for utilities, \$100 for telephone, \$100 for health care, \$700 for auto expenses, and \$160 for storage fees for a total of \$1,960. He also listed food costs at \$700, eating out at \$300, laundry at \$50, clothing costs at \$200, and gifts and entertainment at \$100 for additional monthly expenses of \$1,350. His monthly expenses total approximately \$3,310. His financial statement indicates that he is also paying \$866 a month on a 401k loan which uses his remaining funds, leaving no funds to pay his remaining debts. Applicant has not paid the second mortgage on the marital home since July 2010. This debt is current because his former wife pays the mortgage.¹⁶

Applicant's employer suspended his use of a company credit card in 2009 and 2010 for failure to pay the bill and for misuse. About that time, his employer tightened its policies on use of the company credit card. Applicant resolved his problems with the company credit card. When he travels for business, he pays his expenses with the company credit card. Upon his return, he submits his expense receipts for approval and payment. The company pays the credit card company directly.¹⁷

Policies

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the adjudicative guidelines. 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, 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. 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, an applicant is

¹⁶GE 4; Tr. 44-48, 52-58, 81.

¹⁷GE 5; Tr. 92-95, 99-101.

responsible for presenting “witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel. . . .” An applicant has the ultimate burden of persuasion for obtaining 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 an 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.

AG ¶ 19 describes the disqualifying conditions that could raise security concerns. I have considered all the conditions, and the following are potentially applicable:

- (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.

Applicant developed significant financial problems from his highly contentious divorce. He did not file his federal or state income tax returns for the last five years. His debts have not been resolved. These three disqualifying conditions apply.

The Financial Considerations guideline also includes examples of conditions that can mitigate security concerns. I have considered mitigating factors AG ¶ 20(a) through ¶ 20(f), and the following is potentially applicable:

(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;

Applicant's financial problems started when his wife filed for divorce in 2008 and were complicated by the DUI sting perpetrated against him. Since 2008, Applicant has been embroiled in legal actions related to his divorce. The family court awarded his wife significant family support and directed he pay several joint debts. Despite his income, the family support payments take at least one-half of his net income. His current financial situation is a direct result of his divorce and the DUI. This mitigating condition is only partially applicable because Applicant has not acted responsibly by taking steps to resolve his past-due debts.

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. The decision to grant or deny a security clearance requires a careful weighing of all relevant factors, both favorable and unfavorable. In so doing, an administrative judge must review all the evidence of record, not a single item in isolation, to determine if a security concern is established and then whether it is mitigated. A determination of an applicant's eligibility for a security clearance should not be made as punishment for specific past conduct,

but on a reasonable and careful evaluation of all the evidence of record to decide if a nexus exists between established facts and a legitimate security concern.

In reaching a conclusion, I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case.¹⁸ Applicant's financial situation spiraled out of control after his wife filed for divorce. She hired a private detective to obtain negative information against Applicant, which could be used to obtain a more favorable divorce. The private detective conducted a DUI sting on Applicant in December 2008, which resulted in a criminal conviction. This conviction contributed to more favorable decisions for his former wife in their divorce case. Over the last five years, Applicant has focused his energy on resolving or challenging the continuing issues related to his divorce. After learning that his DUI was the result of a sting operation, Applicant filed a civil lawsuit against the persons involved. During this time, he has neglected his finances, in particular his taxes. His former wife will not complete a required IRS form or work with him on their 2008 and 2009 federal and state income taxes. Applicant has paid nearly \$300,000 in family support since 2008. Despite his payments, he is in arrears on his family support payments because the court directed payments higher than state law allows to be garnished.

Applicant has been overwhelmed by the circumstances surrounding his divorce. He has been unable to focus on his financial problems to his detriment. At this time, he is waiting for a settlement in his civil action to resolve his old debts. Although such a settlement is probable, it is not guaranteed. He has not taken any definitive steps to resolve his debts, nor does he have a reasonable plan to pay his debts. At this time, a security concern remains. Applicant needs additional time to gain control of his finances. In looking at all the evidence of record, I find that Applicant has not mitigated the security concerns raised about his finances.

¹⁸In assessing whether an Applicant has established mitigation under Guideline F, the Appeal Board provided the following guidance in ISCR Case No. 07-06482 at 3 (App. Bd. May 21, 2008):

In evaluating Guideline F cases, the Board has previously noted that the concept of "meaningful track record" necessarily includes evidence of actual debt reduction through payment of debts." See, e.g., ISCR Case No. 05-01920 at 5 (App. Bd. Mar. 1, 2007). However, an applicant is not required, as a matter of law, to establish that he has paid off each and every debt listed in the SOR. See, e.g., ISCR Case No. 02-25499 at 2 (App. Bd. Jun. 5, 2006). All that is required is that an applicant demonstrate that he has "... established a plan to resolve his financial problems and taken significant actions to implement that plan." See, e.g., ISCR Case No. 04-09684 at 2 (App. Bd. Jul. 6, 2006). The Judge can reasonably consider the entirety of an applicant's financial situation and his actions in evaluating the extent to which that applicant's plan for the reduction of his outstanding indebtedness is credible and realistic. See Directive ¶ E2.2(a) ("Available, reliable information about the person, past and present, favorable and unfavorable, should be considered in reaching a determination.") There is no requirement that a plan provide for payments on all outstanding debts simultaneously. Rather, a reasonable plan (and concomitant conduct) may provide for the payment of such debts one at a time. See, e.g., ISCR Case No. 06-25584 at 4 (App. Bd. Apr. 4, 2008). Likewise, there is no requirement that the first debts actually paid in furtherance of a reasonable debt plan be the ones listed in the SOR.

Overall, the record evidence leaves me with questions or doubts as to Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant has not mitigated the security concerns arising from his finances under Guideline F.

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.u:	Against Applicant
Subparagraph 1.v:	For 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.

MARY E. HENRY
Administrative Judge