



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



In the matter of:)	
)	
REDACTED)	ISCR Case No. 12-09470
)	
Applicant for Security Clearance)	

Appearances

For Government: Eric H. Borgstrom, Esq., Department Counsel
For Applicant: Alan V. Edmunds, Esq.

09/14/2016

Decision

MENDEZ, Francisco, Administrative Judge:

Applicant mitigated security concerns raised by the accumulation of delinquent debt. He incurred the debt as a result of several matters beyond his control, including divorce and unstable employment. He took responsible action to address and resolve his debts. His financial situation no longer raises a concern about his ability to handle and safeguard classified information. Clearance is granted.

History of the Case

On June 15, 2015, the Department of Defense (DOD) Consolidated Adjudications Facility (CAF) sent Applicant a Statement of Reasons (SOR) alleging that his circumstances raised security concerns under the financial considerations guideline.¹ On June 24, 2015, Applicant answered the SOR and initially requested a determination based on the administrative (written) record (Answer). He subsequently requested a hearing to establish his eligibility for 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; Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the Adjudicative Guidelines (AG) implemented by the Department of Defense on September 1, 2006.

On May 9, 2016, the Defense Office of Hearings and Appeals (DOHA) issued a notice scheduling the hearing for June 7, 2016.² The hearing was convened as scheduled. Applicant testified, and Government exhibits (Gx.) 1 – 7 and Applicant's exhibits (Ax.) A – G were admitted in evidence without objection. Applicant was granted time post-hearing to submit additional matters. He timely submitted Ax. H and I, which were admitted in evidence without objection.³ The hearing transcript (Tr.) was received by DOHA on June 13, 2016, and the record closed on June 24, 2016.

Findings of Fact

Applicant, 50, is divorced and has two children. He earned some college credit, but does not have an undergraduate degree. He is a lead software engineer for his employer, a federal contractor. He submitted a security clearance application in connection with his employment in 2012. He has not previously held a security clearance, but accrued a good track record in handling and safeguarding the proprietary and sensitive information entrusted to his care by his former employers. Several current and former co-workers, as well as supervisors, submitted reference letters and provided favorable opinions regarding Applicant's professionalism, honesty, reliability, and overall good character. He used to work at the World Trade Center in New York City and survived the September 11, 2001 terrorist attack. (Ax. B, C.1; C.2 – C.6)

Applicant was married for approximately 10 years, from about 1996 to 2006. In the fall of 2003, he was laid off by his former employer. He was earning approximately \$120,000 a year at his old job and was unable to find another job paying a comparable salary. He was only able to obtain part-time work, earning a monthly salary of approximately \$600. Applicant's former wife, whom he had financially supported and whose college education he paid for, graduated from college around the same time Applicant lost his job. Applicant asked her to help him pay for the family's expenses. She refused and a few months later, on Applicant's birthday, left the marriage.

In late 2003, Applicant decided to liquidate about \$35,000 he held in investments, but discovered that his broker had absconded with his money and had been providing him with false investment statements. Applicant reported the matter to the authorities. Unable to find a suitable job, Applicant withdrew over \$90,000 from his 401(k) retirement account to pay his family's recurring monthly expenses.

In September 2005, Applicant filed his tax return for tax year 2004. He did not timely file the tax return and was unable to pay the tax liability resulting from his early 401(k) withdrawal. He owed approximately \$57,000 in income taxes and, as of January 2013, after incurring additional interest and penalties, his tax debt had grown to over \$76,000.

² Prehearing scheduling correspondence, notice of hearing, and case management order were marked and attached to the record as Hearing Exhibits (Hx.) I – III, respectively.

³ Applicant's post-hearing exhibits were remarked to remain consecutive with the exhibits admitted at hearing.

Applicant was able to find a new job in mid-2004, but he was later unemployed for about 23 months. He obtained a job with his current employer in 2010. After his employment stabilized, Applicant took several steps to address his sizeable tax debt. He hired an accountant to contact and negotiate with the IRS. He deducted far more in federal taxes from his wages than he owed in order to reduce his 2004 tax debt and, as of the hearing, he had been paying for over a year through an automatic wage deduction. He pays the IRS \$250 every two weeks to resolve the tax debt.

As of April 2015, when Applicant submitted his Answer, he had reduced his \$76,000 federal tax debt to less than \$15,000. (Ax. E) As of the hearing, Applicant had further reduced his federal tax debt to less than \$7,500. He continues to pay the tax debt through automatic wage deduction. His tax filings are up-to-date and he does not have any other delinquent tax debt. (Tr. 14-26, 31-42, 54-65; Ax. C.7; Ax. C.8; Ax. F) Applicant's 2004 federal tax debt is listed at SOR 1.a. He responsibly addressed the tax debt and it is being resolved.

Applicant and his former wife were held jointly liable for the 2004 federal tax debt. Applicant provided the settlement agreement that was incorporated into their divorce decree, wherein his former wife was held liable for half the tax debt. She did not pay her half of the tax debt and a judgment was entered against her for over \$12,000, which, at the time, represented half of the amount that Applicant had paid towards the debt. (Ax. H, Ax. I) Applicant's former wife moved to another state and, as of the close of the record, Applicant was attempting to enforce and collect on the judgment.

Applicant also incurred a sizeable amount of consumer-related debt while unemployed and going through the divorce. He hired an accountant who helped Applicant contact his creditors, negotiate settlements with each of the creditors, and establish a payment plan to satisfy the debts. Applicant submitted documentation to the DOD CAF of having resolved over \$50,000 in consumer-related debt with the assistance of his accountant. He credibly testified that the debt referenced in SOR 1.b was resolved with the assistance of his accountant. Credit reports from 2014 through 2016 corroborate Applicant's testimony, as the debt alleged in SOR 1.b does not appear on these reports and a new credit card account with the same creditor appears on the most recent report. (Tr. 42-47; Gx. 2 - Gx. 4; Gx. 7; Ax. D) Applicant's current credit report reflects this new credit card account has a \$5,000 credit limit, with a \$0 balance. It also reflects that Applicant pays this and other accounts as agreed. No negative entries appear on this current credit report. (Gx. 7)

Applicant reported his 2004 tax debt on his security clearance application. He cooperated throughout the processing of his application, including responding to questions posed by a security investigator and providing answers in response to an interrogatory sent by the DOD CAF. (Gx. 1; Gx. 2; Gx. 6)

Applicant received financial counseling. He currently earns approximately \$100,000 a year and until recently supplemented his income through part-time work as the superintendent at the building where he rents an apartment. Applicant's youngest

son is currently living with him while attending school. Applicant does not receive any child support from his former spouse. Applicant's budget reflects that after paying recurring monthly expenses he has a positive net remainder, which he uses to pay for unexpected expenses and save for future purchases or contingencies. He drives a late-model (1996) car. He has reestablished a retirement savings account, accumulating over \$35,000 in his employer-sponsored 401(k) account.

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 for a security clearance, 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.

Department Counsel must present evidence to establish controverted facts alleged in the SOR. Directive ¶ E3.1.14. Applicants are responsible for presenting "witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by the applicant or proven . . . and has the ultimate burden of persuasion as to obtaining a favorable clearance decision." Directive ¶ E3.1.15.

Administrative judges are responsible for ensuring that an applicant receives fair notice of the issues raised, has a reasonable opportunity to litigate those issues, and is not subjected to unfair surprise. ISCR Case No. 12-01266 at 3 (App. Bd. Apr. 4, 2014). 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.

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.

Analysis

The security concern under this guideline 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. An individual who is financially overextended is at risk of having to engage in illegal acts to generate funds.

The financial considerations security concern is not limited to a consideration of whether an individual with financial problems might be tempted to compromise classified information or engage in other illegality to pay their debts. It also addresses the extent to which an individual's delinquent debts cast doubt upon their judgment, self-control, and other qualities essential to protecting classified information.⁴

Applicant's accumulation of a sizeable amount of delinquent debt implicates the financial considerations security concern. The record evidence also raises the disqualifying conditions listed at AG ¶¶ 19(a), "inability or unwillingness to satisfy debts," and 19(c), "a history of not meeting financial obligations."

Additionally, Applicant's failure to timely file his 2004 federal tax return raises the disqualifying condition listed at AG ¶ 19(g), "failure to file annual Federal, state, or local income tax returns as required or the fraudulent filing of the same." Applicant bears a heavy burden in mitigating the security concerns arising from his past failure to timely file and pay his taxes.⁵

The guideline lists a number of conditions that could mitigate the concern. The following mitigating conditions are most relevant:

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

⁴ ISCR Case No. 11-05365 at 3 (App. Bd. May. 1, 2012).

⁵ See *generally*, ISCR Case No. 14-03358 at 3 (App. Bd. Oct. 9, 2015) (Board explained the heightened security concerns raised by tax-related financial issues, as follows: "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.").

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; and

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

A security clearance adjudication is not a debt collection process. Instead, an administrative judge examines the way an applicant handles their financial obligations to make a predictive judgment about how they will handle their security obligations.⁶ Applicant's eligibility for a security clearance was called into question by the evidence submitted by the Government showing the accumulation of delinquent debt. Furthermore, Applicant's failure to timely file and pay his taxes raised heightened security concerns about his judgment and ability to abide by rules and regulations, requiring a closer examination regarding the circumstances giving rise to his past financial problems and his response to it.

Applicant's past financial problems were primarily due to matters beyond his control, notably, divorce, unstable employment, and a significant reduction in income. He was also the victim of fraud that initially contributed to his financial situation. He did not sit idly by as his financial situation worsened. Instead, he retained an accountant who helped him address and resolve his debts. With the accountant's help, Applicant filed his overdue tax return, paid down his tax debt from a high of over \$76,000 to now less than \$7,500, and settled and paid over \$50,000 in consumer-related debt. He has received financial counseling, lives within his means as evidenced by three years of credit reports and other record evidence, and his financial situation has started to finally improve after years of satisfying past debts and paying outsized legal bills associated with his divorce and recent efforts to compel his former wife to pay her share of the tax debt. He has not accrued other past-due debt and has timely filed his tax returns and paid his taxes since 2004. AG ¶¶ 20(a) through 20(d) apply.

Applicant's past tax issue was not due to procrastination,⁷ indifference, or intentional refusal to comply with tax laws.⁸ Instead, he found himself out of work and unable to pay his family's bills after he became unemployed and his income fell sharply. He decided to liquidate his investment funds only to uncover that he had been defrauded by his broker. Left with no other recourse, Applicant took an early withdrawal from his 401(k) retirement account which allowed him to pay his family's recurring

⁶ 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).

⁷ See, e.g., ISCR Case No. 14-00221 (App. Bd. June 29, 2016).

⁸ See, e.g., ISCR Case No. 98-0761 (App. Bd. Dec. 27, 1999).

expenses but left him with a sizeable tax debt. He has reduced the tax debt significantly over the years and it is reasonable to surmise based on his track record of debt repayment that he will continue to address this issue and manage his finances in a responsible manner.

Individuals applying for a security clearance are not required to be debt free, nor are they required to resolve all past-due debts simultaneously or even resolve the delinquent debts listed in the SOR first. However, they are expected to present documentation to refute, explain, or mitigate security concerns raised by their circumstances. Moreover, they bear the burden of showing that they manage their current finances in a manner expected of those granted access to classified information.⁹ After considering all the evidence, both favorable and unfavorable, as well as the whole-person factors,¹⁰ I find that Applicant met his heavy burden of proof and persuasion in mitigating the security concerns raised by his past financial circumstances.

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 (Financial Considerations) FOR APPLICANT

Subparagraphs 1.a and 1.b: For Applicant

Conclusion

In light of the circumstances presented by the record in this case, it is clearly consistent with the national interest to grant Applicant access to classified information. Applicant's request for a security clearance is granted.

Francisco Mendez
Administrative Judge

⁹ ISCR Case 07-10310 at 2 (App. Bd. Jul. 30, 2008).

¹⁰ See AG ¶ 2(a).