



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



In the matter of:)	
)	
REDACTED)	ISCR Case No. 14-04597
)	
Applicant for Security Clearance)	

Appearances

For Government: Andre M. Gregorian, Esq., Department Counsel
For Applicant: *Pro se*

07/25/2016

Decision

MENDEZ, Francisco, Administrative Judge:

Applicant did not mitigate security concerns raised by his financial situation. He accumulated over \$50,000 in overdue federal income taxes for tax years 2005 – 2012, which remain unpaid. Notwithstanding the presence of some favorable information, Applicant failed to meet his heavy burden of persuasion. Clearance is denied.

History of the Case

On December 1, 2014, 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 December 23, 2014, Applicant answered the SOR and requested a hearing to establish his continued eligibility for access to classified information (Answer).

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 September 18, 2015, Department Counsel indicated the Government was ready to proceed. On January 11, 2016, I was assigned the case and, per the parties' agreement, scheduled the hearing for March 8, 2016. I granted Applicant's request for a continuance and the hearing was rescheduled for April 5, 2016.² The hearing was convened on this later date. Applicant testified and I admitted, without objection, Government exhibits (Gx.) 1 – 8 and Applicant's exhibits (Ax.) A – G. At Applicant's request, I kept the record open to afford him the opportunity to supplement the record. He did not submit additional evidence.³ The hearing transcript (Tr.) was received on April 13, 2016, and the record closed on April 22, 2016.

Findings of Fact

Applicant is in his mid-fifties. He and his wife divorced after nearly 20 years of marriage in 2004. He has five children. He earned a bachelor's degree in 1984 and is currently working on a master's degree. Also in 2004, Applicant retired from the U.S. military after 20 years of honorable service. After retiring from the military, Applicant has worked for several different government contractors. He has been with his current employer since July 2013, earning an annual salary of approximately \$92,000. He was first granted a security clearance in 1982. (Tr. 27-33; Gx. 1)

Applicant experienced several periods of unemployment over the past several years. He was unemployed for about 25 months between June 2007 and July 2013. However, when he regained employment, he did not have a sufficient amount of taxes deducted from his wages. He did not adjust his tax withholdings, because he needed the extra income to pay his other debts, notably, his child support and mortgage.

Applicant was unable to pay his federal income taxes for tax years 2005 – 2012, accumulating a federal tax debt of more than \$50,000. Also, during this period, he either did not file his federal income tax returns or filed them late. As of the hearing, he had yet to file some of his overdue federal income tax returns.

In 2009, Applicant attempted to resolve his then federal tax debt through an IRS installment agreement. But, when he lost his job, he stopped paying on the installment agreement.

In 2014, the IRS contacted Applicant's employer in order to have them increase the amount of federal taxes deducted from his pay. Applicant also entered into a new installment agreement. He submitted documentation reflecting his payments of nearly \$3,000 through July 2014. As of July 2014, he owed approximately \$50,700 for tax years 2005 – 2012. He did not provide further documentation showing that he continued to pay on the installment agreement. (Tr. 33-40, 57-59; Gx. 1; Ax. D; Ax. F; Ax. G)

² Prehearing scheduling correspondence and the notices of hearing are attached to the record as Hearing Exhibits (Hx.) I – II, respectively.

³ Post-hearing correspondence to the parties is attached to the record Hx. III. *See also*, Tr. 60-61.

Applicant did not file his 2011 state income tax return. (Answer) At hearing, Applicant stated that he had filed the state tax return and paid the resulting \$800 state tax liability. He did not provide documentation to corroborate his testimony. He did, however, admit in response to questions by Department Counsel that his wages were being garnished to satisfy an \$845 state tax lien. (Tr. 40-43.) Applicant's past-due federal and state tax debts are referenced at SOR 1.a – 1.i.

Applicant also incurred other delinquent debt while unemployed. He fell behind on his child support obligation and monthly mortgage payments. By June 2013, Applicant was over 12 months in arrears on his court-ordered child support. He was ordered to pay \$2,125 monthly in child support. He paid the court-ordered child support, and it was cut nearly in half by court order in July 2015. At hearing, Applicant anticipated his court-ordered child support would cease in May 2016, when his youngest child reached the age of majority.

In 2013, Applicant filed for Chapter 13 bankruptcy to save his home from foreclosure. His bankruptcy petition reflects liabilities totaling over \$225,000 and assets of less than \$5,000. The Chapter 13 bankruptcy case was dismissed because Applicant failed to attend the required financial counseling course. He claims to have subsequently received financial counseling, but did not provide documentation to corroborate his claim. The dismissed bankruptcy case is referenced at SOR 1.j.

Applicant was able to attain a modification of his mortgage in 2014 and has brought the home loan current. Applicant's past mortgage-related issue is referenced at SOR 1.k. (Tr. 28-29, 46, 54; Gx. 1; Gx. 4 – 6; Ax. A)

The SOR also lists at 1.l – 1.n three consumer-related debts totaling about \$7,000. Applicant disputes these debts, noting he paid the debt, brought the account current, or never had an account with the creditor. The record evidence corroborates his testimony that he brought the account for largest of these debts for over \$6,000 current. (Tr. 48-51; Gx. 4)

Applicant testified that the current balance in his savings account is approximately \$50. He pays about \$600 a month to pay down his credit card debt. (The record is silent as to the total amount of credit card debt owed.) He contributes to his employer-sponsored 401(k) retirement plan. He described living frugally, driving a 20-year-old car and owning a T.V. that is over 15 years old. (Tr. at 51-52, 56-61) He disclosed his adverse financial record on the security clearance application (SCA), which he submitted in January 2014. (Gx. 1)

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

Guideline F, Financial Considerations

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 failure to pay his federal income taxes for a period of eight years implicates the financial considerations security concern. The record evidence also establishes 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 federal income tax returns for tax years 2005 – 2012 and 2011 state income 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."⁵

An applicant who fails to timely file or pay his or her taxes, a basic and fundamental financial obligation of all citizens, bears a heavy burden in mitigating the financial considerations security concern.⁶ An administrative judge should closely examine the circumstances giving rise to an applicant's tax-related issues and his or her response to it. Furthermore, an applicant's claim of financial reform must be weighed against the overriding concerns about the individual's lack of judgment and history of failing to abide by rules and regulations in failing to timely file or pay their taxes.⁷

The guideline lists a number of conditions that could mitigate the financial considerations security 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

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

⁵ In ISCR Case No. 12-11375 at 6 (App. Bd. June 17, 2016), the Appeal Board remanded an unfavorable decision because the judge improperly used numerous non-alleged tax debts as a basis for disqualification. In contrast, in the present case, although Applicant's failure to timely file his federal tax returns was not alleged, he was on clear notice that the circumstances leading to the alleged SOR tax debts were a security concern. ISCR Case No. 14-00151 at 3 (App. Bd. Sep. 12, 2014) ("a Judge may consider not only the extent of an applicant's debts but also the circumstances under which they were incurred and the applicant's response to them.").

⁶ 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.").

⁷ ISCR Case No. 14-05794 (App. Bd. July 7, 2016); ISCR Case No. 14-00221 (App. Bd. June 29, 2016); ISCR Case No. 15-01031 (App. Bd. June 15, 2016); ISCR Case No. 12-09545 (App. Bd. Dec. 21, 2015).

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; and

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

Applicant's current financial problems are rooted in the 25 months of unemployment he experienced between June 2007 and July 2013. However, application of AG ¶ 20(b) is not warranted because Applicant did not act responsibly under the circumstances. Specifically, over a period of eight years, Applicant refused to voluntarily change his tax withholdings and then repeatedly failed to pay his federal income taxes. See, e.g., ISCR Case No. 14-05794 at 6 (App. Bd. July 7, 2016) (Board reversed, in part, because judge failed to adequately address applicant's failure to withhold a sufficient amount taxes from his wages over a period of four years and delay in addressing his sizeable tax debt).

Applicant does receive credit under AG ¶ 20(d) for addressing his delinquent court-ordered child support (a non-alleged SOR debt), mortgage, and other consumer-related debt. However, he was only able to do so by neglecting the fundamental obligation of all citizens to file and pay their taxes. Despite regaining full-time employment with his current employer in July 2013, Applicant only started to address his tax debt at about the same time the current security clearance review was initiated.

Applicant also failed to provide documentation to show that he continued to pay on the current IRS installment agreement. In light of his past failure to comply with the terms of a prior installment agreement and the circumstances under which his Chapter 13 petition was dismissed, I cannot find that there are clear indications his financial problems are being resolved or that his finances are under control. Accordingly, I find AG ¶ 20(d) partially applies, but none of the other mitigating conditions 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 comments under Guideline F and highlight some additional whole-person factors.

Applicant has held a clearance for decades without apparent issue, except for those listed in the SOR. He served honorably in the U.S. military for 20 years and thereafter as a government contractor, including, at times, in austere and dangerous locations. He was honest on his SCA and throughout the course of the security clearance process regarding his adverse financial record. He experienced long periods of unemployment after retiring from the military and the tenuous hold he had on his finances was further crippled by the substantial financial obligations he incurred after his marriage of nearly 20 years ended.

Notwithstanding these and other favorable record evidence, Applicant failed to meet his heavy burden of persuasion for continued access to classified information. Notably, over the course of several years, he repeatedly and routinely failed to abide by the obligation of all citizens to file and pay his taxes, raising concerns he would treat his security obligations in a similar fashion. Overall, the record evidence leaves me with doubts about his security clearance eligibility.

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)	AGAINST APPLICANT
Subparagraphs 1.a – 1.j:	Against Applicant
Subparagraphs 1.k – 1.n:	For Applicant

Conclusion

In light of the circumstances presented by the record in this case, 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