



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



In the matter of:)	
)	
)	ISCR Case No. 14-04653
)	
)	
Applicant for Security Clearance)	

Appearances

For Government: Caroline E. Heintzelman, Esquire, Department Counsel
For Applicant: *Pro se*¹

02/27/2017

Remand Decision

WHITE, David M., Administrative Judge:

Applicant incurred significant delinquent debt during the past five years, and failed to file Federal income taxes, as required, for several years. He repaid some debts, but fell more than \$33,000 behind on his home mortgage while doing so. The evidence is insufficient to mitigate resulting security concerns. Based upon a review of the pleadings, testimony, and exhibits, eligibility for access to classified information is denied.

Statement of the Case

Applicant submitted a security clearance application (SF 86) on June 21, 2011. On December 8, 2014, the Department of Defense Consolidated Adjudications Facility

¹Applicant retained Ms. Leanne M. Innet, Esquire, to help him prepare for the hearing, but they both stated that she was not retained to appear in person during the hearing. I informed both of them that he could ask to put the hearing in recess and contact her, by telephone, for advice at any time he so desired. (Tr. 6-13.) He did not choose to consult with her during the hearing, but she represented him on appeal of the original decision in this case, which found him to be ineligible for a security clearance.

(DoD CAF) issued a Statement of Reasons (SOR) to Applicant, 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; Department of Defense 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*, effective within the Department of Defense after September 1, 2006.

Applicant answered the SOR in writing (Answer) on March 5, 2015, and requested a hearing before an administrative judge. Department Counsel was prepared to proceed on June 29, 2015. The case was assigned to me on July 9, 2015. The Defense Office of Hearings and Appeals (DOHA) issued a Notice of Hearing on July 21, 2015, and I convened the hearing, as scheduled, on August 12, 2015. The Government offered Exhibits (GE) 1 through 5, which were admitted without objection. Applicant testified on his own behalf and offered exhibits (AE) A through I, which were admitted without objection. I granted Applicant's request to leave the record open until August 26, 2015, for submission of additional evidence. DOHA received the transcript of the hearing (Tr.) on August 19, 2015.

On March 10, 2016, DOHA issued the original decision in this case, denying Applicant's eligibility for a security clearance. Applicant claimed, on appeal, that he submitted additional evidence in an email while the record remained open. That email was never received or acknowledged by Department Counsel or me. However, on May 17, 2016, the DOHA Appeal Board remanded my original decision with instructions to consider the additional information that Applicant submitted with the appeal. Department Counsel offered no objection to the admissibility of this additional information, which is therefore admitted into the record as AE J and incorporated into this remand decision.

Findings of Fact

Applicant is a 51-year-old field service engineer who has worked for a defense contractor since July 2012. He worked as a technical specialist for another defense contractor from February 2008 until November 2011, when that company lost the contract under which he had been working. In March 2012 he and his wife started the retail business, which they continue to operate, and he worked there full time until obtaining his present position. In March 2008 he retired in pay grade E-6, with an honorable discharge, after active duty service in the U.S. Army that began in November 1987. He is married, with three children ages 28, 25, and 18, all of whom resided with him when the record closed. He held a security clearance throughout most of his military service and subsequent employment by defense contractors. (GE 1; GE 2; Tr. 9-13, 54.)

In his response to the SOR, Applicant admitted all of the allegations concerning his financial history, except SOR ¶ 1.b and part of SOR ¶ 1.a. (AR.) Applicant's admissions are incorporated in the following findings.

Applicant's wife managed their family finances for many years due to his work demands and frequent periods of lengthy travel away from home. For tax year 2010, after she had purchased a small business, she hired an accountant to prepare their Federal income taxes. She was dismayed to learn that they owed \$8,618 more in taxes than had been withheld during the year, and they did not have funds to pay those taxes. From the unsigned copies of their 2010 Form 1040 submitted with Applicant's SOR response and in AE A, it is unclear whether they filed that return without paying the taxes or simply failed to file it altogether. In his response to ¶ 1.j of the DoD CAF Financial Interrogatories (GE 2), Applicant admitted that he had not filed his Federal tax returns for tax years 2010 to 2012, and that he did not file the 2011 return due to pending mortgage delinquency issues. One of the two unsigned copies of their 2010 return contains the date, "4/14/11," as the date the accountant prepared the return. Applicant's and his wife's signature blocks are blank and undated. The copy of that return he submitted in AE A does not show a date in the Tax Preparer's block. His wife testified that she (and he) did not file their subsequent year tax returns due to the amount of unpaid taxes from 2010. Applicant testified that he knew the 2011 through 2013 returns were not filed when required. (Answer; GE 2; AE A; Tr. 60, 85-86.)

The IRS documentation Applicant submitted with his appeal shows that Applicant's 2010 Federal income tax return was timely filed and received by April 15, 2011; with \$37,740 in taxes owed but only \$29,122 having been withheld. The document shows that he finished paying the resulting tax delinquency on June 4, 2015. (AE J.)

Applicant and his wife filed their Federal income tax returns for tax years 2011 through 2013 on March 4, and 5, 2015, when he submitted his Answer to the SOR. He also submitted an unsigned and undated copy of a Federal tax return for 2014 during his hearing. These four tax returns indicated that Applicant and his wife were due refunds of \$696 for 2011; \$3,207 for 2012; and \$1,420 for 2014; but owed an additional \$227 in taxes for 2013. On July 21, 2015, Applicant requested IRS transcripts of the tax returns in question in order to document that they had been filed and the taxes were paid. He was granted additional time after his hearing to obtain these transcripts, but he failed to effectively submit them before issuance of the original decision in this case. The documents that he submitted with his appeal confirm the tax information detailed above; and show that he made additional payments totaling \$3,375 during May and June 2015 to resolve his remaining Federal income tax delinquency from 2010. (Answer; GE 2; AE A; Tr. 35, 60-61, 94-95.)

Applicant provided documentation showing that in November 2012 he fully repaid the mortgage loan that he previously held in connection with a former residence in another state, which went into foreclosure after he unsuccessfully tried to convert it into a rental property. This debt, alleged in SOR ¶ 1.b, is resolved. (Answer; GE 2; AE B; Tr. 36, 64-66, 68-71.)

On March 5, 2015, Applicant made a final payment to settle the delinquent debt alleged in SOR ¶ 1.c for a negotiated lesser amount. This debt, which became delinquent in March 2012, is resolved. (Answer; AE C; Tr. 36-37.)

Applicant's salary is being garnished for the delinquent \$1,224 student loan debt alleged in SOR ¶ 1.d. This debt, which had been delinquent since February 2010, is being involuntarily resolved. (AE D; Tr. 37.)

On August 6, 2015, Applicant paid \$690 to resolve the student loan debt alleged in SOR ¶ 1.e. This debt, which had been delinquent since March 2010, is resolved. (AE E; Tr. 37-38.)

The two delinquencies to a major bank, alleged in SOR ¶¶ 1.f and 1.h, represent different credit report listings concerning the same account. Record evidence shows that this debt has been fully repaid and has a zero balance due. (Answer; GE 3; GE 4; GE 5; AE G; Tr. 38-44, 46-47.)

The two delinquencies to a different major bank and a collection agency for that bank, alleged in SOR ¶¶ 1.g and 1.i, also represent different credit report listings concerning a \$2,853 credit card balance that became delinquent in May 2009. The collection agency obtained a judgment against Applicant for that amount in May 2013, and his recent communications with the creditor indicate that the amount due has grown to \$4,006. No agreement had been reached to resolve this debt as of the time of Applicant's hearing. (Answer; GE 2; GE 5; AE F; AE I; Tr. 44-46, 49-51.) In his appeal submission, Applicant included copies of emails and a check stub, dated during August 2015, which showed that he negotiated to repay this debt to the collection agency for payments of \$250 every two weeks, and made the first payment by check on August 15, 2015. (AE J.)

Applicant resolved some of the SOR-listed debts as described above, but has not made any payments toward his home mortgage loan since May 2014. The mortgage lender has initiated foreclosure proceedings. Applicant anticipated being forced to leave the property and find rental accommodations for his family within 30 days following his hearing. He also had not paid his recent property taxes on the home. As of June 2015, his home mortgage payments were about \$33,000 past due, with an outstanding balance of about \$242,700 on the loan. He estimated the value of the home at \$150,000 to \$160,000. (AE I; Tr. 51-52, 61-67, 71-75, 78, 84-85, 87.)

Applicant and his wife opened a small retail business that generates some cash flow. They operate this business independently of their family finances, and any profits realized from it have been reinvested in the business. (Tr. 66, 79, 97-98.) Applicant and his wife recently purchased a used car for her to drive. (Tr. 82.) One of their adult children suffers from drug addiction, and a significant, but unspecified, amount of their resources was spent for a series of rehabilitation programs and fees for criminal defense attorney services. Applicant's wife testified that she diverted family funds to these expenses without Applicant's knowledge or consent. (Tr. 80, 87-89.)

Applicant's tax returns indicate that his income has fluctuated over the past five years, but he testified that his base salary is about \$72,000 per year. His testimony demonstrated minimal knowledge of the family budget, and he had not sought any financial counseling before his hearing. (Tr. 55-60, 68, 83.) After the hearing, he made an appointment to see a counselor at the local joint base Armed Forces Community Service Financial Readiness Program. No budget information was provided. (AE J.)

Applicant's lead engineer wrote a character reference letter describing Applicant's high degree of accountability, responsibility, honesty, and trustworthiness. Applicant has performed in demanding and dangerous environments, displaying good judgment and achieving outstanding results. Applicant earned a Meritorious Service Medal, six Army Commendation Medals, a Joint Service Achievement Medal, five Army Achievement Medals, six Army Good Conduct Medals, and various unit and service awards during his Army career. (AE H.)

Policies

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the adjudicative guidelines (AG). In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions (DCs) and mitigating conditions (MCs), which are to be 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 AG ¶ 2 describing the adjudicative process. The administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense decision. According to AG ¶¶ 2(a) and 2(c), the entire process is a conscientious scrutiny of applicable guidelines in the context 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 the 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. Likewise, I have avoided drawing inferences grounded on mere speculation or conjecture.

Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, "[t]he 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, and has the ultimate burden of persuasion as to obtaining a favorable clearance decision." Section 7 of Executive Order 10865 provides: "[a]ny determination under this order adverse to an

applicant shall be a determination in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.”

A person applying for access to classified information seeks to enter 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 the 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.

Analysis

Guideline F, Financial Considerations

The security concerns under the guideline for financial considerations are set out in AG ¶ 18, which reads in pertinent part:

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 record evidence potentially raises security concerns under three Guideline F DCs, as set forth in AG ¶ 19:

- (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’s history of significant delinquent debt goes back more than five years, and continues to date. He failed to file his Federal income tax returns as required for several of those years, and only did so contemporaneously with submitting his Answer to the SOR. These debts, and his history of financial irresponsibility, raise security concerns under DCs 19(a), (c), and (g), thereby shifting the burden to Applicant to rebut, extenuate, or mitigate those concerns.

The guideline includes five conditions in AG ¶ 20 that could mitigate security concerns arising from Applicant's financial difficulties:

(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;

(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;

(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;

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

(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.

Some of Applicant's SOR-listed delinquent debts are ongoing, without indication that the circumstances under which they arose have significantly changed. He resolved some of those debts, but did so while failing to make more than \$33,000 in payments toward his home mortgage that became due since May 2014. His history of financial irresponsibility spans many years, despite regular employment or voluntary self-employment during all but four months while between jobs. He therefore failed to establish substantial mitigation under MC 20(a).

Applicant also offered insufficient evidence to support mitigation under MC 20(b). He voluntarily incurred all of the debt in question and chose not to file required income tax returns. His family's small business generated profits that they chose to reinvest rather than pay lawful creditors. His relatively brief period of unemployment five years ago and his son's substance abuse problems do not sufficiently explain his ongoing financial troubles or his failure to file tax returns as required. He did not demonstrate responsible action under those circumstances.

Applicant provided insufficient evidence of effective credit counseling, budget planning, or changes to bring his financial situation under control. He said that he has taken over management of the family finances from his wife and showed some progress toward overall debt resolution, but did not establish full mitigation under MC 20(c) or (d). He failed to pay more than \$33,000 in mortgage payments which became due on his

residence as he and his family continued to live there. His August 2015 initial payment of \$250 toward his \$4,006 delinquent judgment debt (SOR ¶¶ 1.g and 1.i) is commendable, but insufficient to establish resolution of that debt. His Federal income tax delinquency issues were finally resolved in June 2015, but he provided no reasonable justification or excuse for failing to file Federal income tax returns for 2011 through 2013 as required. MC 20(e) is not pertinent since Applicant admitted that all debts alleged in the SOR were originally his.

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 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.

I considered the potentially disqualifying and mitigating conditions in light of all pertinent facts and circumstances surrounding this case. Applicant incurred substantial delinquent indebtedness that he made some effort to repay, but contemporaneously became seriously delinquent on his home mortgage payments. He knowingly failed to file Federal income tax returns for several years, without justification. His financial situation remains apparently untenable, creating the ongoing potential for pressure and duress. He presented insufficient evidence to show that his financial situation will not continue to deteriorate, to support a finding that continuation or recurrence are unlikely, or that behavioral changes demonstrate rehabilitation. He is a mature and experienced individual who is accountable for his choices and financial situation. Overall, the record evidence creates ongoing doubt as to Applicant's present eligibility and suitability for a security clearance.

Formal Findings

Formal findings for or against Applicant on the allegations set forth in the SOR, as required by ¶ E3.1.25 of Enclosure 3 of the Directive, are:

Paragraph 1, Guideline F:	AGAINST APPLICANT
Subparagraph 1.a:	Against Applicant
Subparagraph 1.b:	For Applicant
Subparagraph 1.c:	For Applicant
Subparagraph 1.d:	For Applicant
Subparagraph 1.e:	For Applicant
Subparagraph 1.f:	For Applicant
Subparagraph 1.g:	Against Applicant
Subparagraph 1.h:	For Applicant
Subparagraph 1.i:	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.

DAVID M. WHITE
Administrative Judge