



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



In the matter of:)	
)	
REDACTED)	ISCR Case No. 14-06719
)	
Applicant for Security Clearance)	

Appearances

For Government: Nicole A. Smith, Esq., Department Counsel
For Applicant: Steven D. Shemenski, Esq.

07/19/2016

Decision

MENDEZ, Francisco, Administrative Judge:

Applicant mitigated security concerns raised by the accumulation of delinquent debt, which he incurred after his child was diagnosed with cancer and his wife lost her job. He attempted to address his debts on his income alone for about two years before filing for bankruptcy on the advice of counsel. He responsibly addressed and satisfied a sizeable amount of delinquent debt outside the bankruptcy process. He addressed all his delinquent debts well before the Statement of Reasons (SOR) was issued and over 18 months have passed without recurrence of financial issues. He did not falsify his security clearance application. Clearance is granted.

History of the Case

On August 1, 2015, the Department of Defense (DOD) Consolidated Adjudications Facility (CAF) sent Applicant an SOR alleging security concerns under the financial considerations and personal conduct guidelines.¹ On August 20, 2015,

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.

Applicant answered the SOR and requested a determination based on the administrative (written) record.²

On October 14, 2015, Department Counsel prepared the Government's written case, a file of relevant material (FORM), and sent it to Applicant. The FORM contains the pleadings (Items 1 and 2) and five documentary exhibits (Items 3 – 7). Without objection, the five documentary exhibits are admitted in evidence.³ On December 18, 2015, Applicant, through his counsel, submitted a response to the FORM (Response). The Response was marked Exhibit A and, without objection, admitted into the record. On March 3, 2016, I was assigned Applicant's case.

Findings of Fact

Applicant is in early sixties. He earned an associate's degree in electrical engineering in 1976 and served in the military from 1977 to 1983, receiving an honorable discharge. He has been married for nearly 40 years, lived at the same address for the past 30 years, and worked for the same employer for over 10 years. He was first granted a security clearance in approximately 1978.

Applicant has gone through two periods of financial difficulty in the past 20 years. In 1995, his financial problems led to the filing of a Chapter 13 bankruptcy petition. Applicant paid his debts through a confirmed Chapter 13 plan. His Chapter 13 was discharged in 1998.

Applicant's most recent period of financial trouble started in late 2009, early 2010, when his then college-age daughter was diagnosed with cancer. Applicant and his wife withdrew money from their respective 401(k) retirement accounts to pay for their daughter's expenses. Distracted by their child's situation, Applicant and his wife neglected to file their tax returns for 2009 and 2010. They filed both tax returns in 2011 and were unable to pay the significant tax liability of approximately \$45,000 that their early 401(k) withdrawals had created.

Applicant contacted the IRS and entered into an installment agreement to resolve the tax debt. He submitted documentary proof of making consistent monthly payments from April 2012 to June 2013. Applicant then sent the IRS more than the agreed-upon monthly payment in an attempt to satisfy the tax debt on an accelerated schedule, but this led to some technical issues that interrupted his ability to pay the debt through the installment agreement. Applicant corroborated this situation through letters from the IRS acknowledging receipt of his numerous inquiries attempting to resolve the matter and the receipt of excess payments. Applicant ultimately satisfied the past-due tax debt. He

² On my own motion, I amended the SOR to correct a minor typographical error. The SOR now correctly reflects the five allegations under Guideline F as SOR 1.a – 1.e.

³ In addition, Item 8, a printout from the Joint Personnel Adjudication System, reflects that Applicant was being sponsored for a clearance. I have considered this document for only this limited purpose.

submitted documentary proof that the tax lien referenced in SOR 1.a, for the past-due 2009 and 2010 taxes, was released months before the SOR was issued.

Applicant's financial situation worsened in 2012, when his wife became unemployed. He tried to pay their debts on his income alone, but started falling further and further behind on the family's bills. He sought the advice of a bankruptcy attorney.

By 2014, Applicant was no longer able to pay the family's debts on his income alone and, upon filing his federal income tax return, was unable to pay the amount of taxes owed. He was advised by the bankruptcy attorney to file for Chapter 7 bankruptcy. Applicant took the required credit counseling course before filing for bankruptcy.

In October 2014, Applicant filed a Chapter 7 bankruptcy petition. The petition reflects that before Applicant's wife became unemployed, the couple earned upwards of approximately \$250,000. Afterwards, the family's only income was Applicant's salary. The bankruptcy petition reflects that Applicant's (gross) monthly salary was approximately \$5,000. In January 2015, Applicant's debts, including the consumer-related debt referenced in SOR 1.e, were discharged by order of the bankruptcy court.

Applicant followed his bankruptcy counsel's advice in resolving his past-due debts, except for the federal tax lien referenced in SOR 1.a. Applicant was advised by his counsel that the tax lien was eligible for resolution through bankruptcy. His counsel submitted a statement corroborating Applicant's recollection of this advice. Instead of resolving the tax debt through bankruptcy, Applicant satisfied the lien with his remaining savings. He also satisfied another tax lien for the overdue taxes for tax year 2013, which is referenced in SOR 1.b, outside of bankruptcy. The two liens together totaled over \$53,000. Both were released before the SOR was issued.

Applicant, in connection with the periodic reinvestigation of his background, submitted a security clearance application (SCA) in May 2014. He voluntarily disclosed that he was having financial problems and was in the process of filing for bankruptcy. (Item 1 at 29) A month later, Applicant sat down for his security clearance background interview. At the start of the interview, Applicant corrected a number of mistakes he had inadvertently made on the SCA, including his response to the question inquiring whether he had failed to file tax returns in the past seven (7) years. Applicant provided the investigator information regarding his failure to timely file his 2009 and 2010 tax returns, which resulted in the now satisfied tax lien referenced in SOR 1.a. (Item 2 at 3)

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 financial circumstances cast doubt upon their judgment, self-control, and other qualities essential to protecting classified information.⁴

Applicant's accumulation of delinquent debt, which has twice led him to file for bankruptcy in the past 20 years, 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, although not specifically alleged, Applicant's failure to timely file his 2009 and 2010 federal income tax returns 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 In light of Applicant's past failure to timely file and pay his taxes, he bears a heavy burden in mitigating the financial considerations security concern. See *generally*, ISCR Case No. 14-03358 at 3 (App. Bd. Oct. 9, 2015) ("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.").

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 downturn, unexpected medical emergency, or a death, divorce or separation), and the individual acted responsibly under the circumstances;

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 2009 and 2010 tax returns was not specifically alleged, he was on clear notice that the circumstances leading to the tax lien, alleged at SOR 1.a, raised 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.").

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.

AG ¶ 20(a) partially applies. Applicant's recent financial problems were primarily attributable to experiencing two major life events beyond his control in close proximity to one another. Specifically, in about 2010, Applicant's daughter was diagnosed with cancer and then, about two years later, Applicant's wife lost her well-paying job. Applicant and his wife's decision to take early withdrawals from their retirement accounts were, especially with the benefit of hindsight, poor financial decisions that had devastating tax consequences. This poor financial decision, coupled with Applicant's failure to timely file and pay his 2009 and 2010 tax returns, raise serious concerns about his judgment and ability to follow rules and regulations.

Applicant did not sit back and do nothing about his debts or walk away from his financial obligations. Instead, he took responsible steps to address his tax situation well before his security clearance eligibility became a concern. First, he filed his overdue returns in 2011. Second, he contacted the IRS and negotiated an installment agreement, which he then paid on a consistent monthly basis for over a year. Third, he resolved the consumer-related debt through bankruptcy. Fourth, he satisfied his sizeable tax debts outside of bankruptcy. However, full application of AG ¶ 20(a) is not warranted because some of the financial issues occurred relatively recently.

AG ¶¶ 20(b) through 20(d) fully apply. As already noted, Applicant's recent financial problems were attributable to the occurrence of two major life events beyond his control in close succession to one another. After his daughter's medical condition improved, Applicant took responsible action by filing his overdue tax returns, agreeing to an installment agreement to pay his overdue taxes, filing for bankruptcy to address his consumer-related debts, and satisfying his delinquent taxes. He received financial counseling and, in the more than 18 months that have passed since he was granted a bankruptcy discharge, the record evidence does not reflect the accumulation of any additional delinquent debt or tax-related issues.

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 may handle their security obligations.⁶ By incurring a sizeable amount of delinquent debt, Applicant placed his continued eligibility for a security clearance in jeopardy. 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 the tax issues and his response to it.

⁶ ISCR Case No. 11-13626 (App. Bd. Nov. 7, 2013); ISCR Case No. 01-25941 (App. Bd. May 7, 2004).

Applicant's past tax issues were not due to procrastination,⁷ indifference or intentional refusal to comply with tax laws,⁸ or other issues that would give rise to deep concerns about his judgment and reliability.⁹ Instead, Applicant's failure to timely file and pay his 2009 and 2010 taxes was related to his daughter's medical condition.¹⁰ His failure to timely pay his 2013 taxes was caused by a significant decrease in family income. Applicant filed his overdue tax returns and satisfied his tax debts. However, Applicant's resolution of the tax-related financial issues is but one of several inter-related favorable factors that lead me to conclude he mitigated the serious security concerns arising from his past financial circumstances.¹¹ Notably, Applicant satisfied his substantial tax debt after being advised that he would be able to resolve it, or at least a significant portion of it, through the bankruptcy process.

Based on when Applicant took action to resolve his tax situation and that he did so even after being advised of the possibility of receiving relief through bankruptcy, I find that he did so in recognition of his obligation to file and pay his taxes and not simply as a means to retain his security clearance. Also, by addressing his tax situation in a responsible and comprehensive manner, Applicant mitigated concerns raised about his judgment and ability to follow rules and regulations.

Guideline E, Personal Conduct

The personal conduct security concern is explained at AG ¶ 15:

Conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations can raise questions about an individual's reliability, trustworthiness and ability to protect classified information. Of special interest is any failure to provide truthful and candid answers during the security clearance process or any other failure to cooperate with the security clearance process.

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).

⁹ See, e.g., ISCR Case No. 14-05794 (App. Bd. July 7, 2016) (for a period of four years, from 2009-2012, applicant did not have a sufficient amount of taxes taken out of his pay, accumulating over \$70,000 in past-due taxes and took no action to resolve it until it became a security concern).

¹⁰ *Contrast with*, ISCR Case No. 15-01031 at 4 (App. Bd. June 15, 2016) ("Applicant's tax filing delinquencies were not due to conditions beyond his control" and, despite previous representations on the SCA that s/he had filed or was in process of filing his tax returns, one of the returns was not filed until after the SOR was issued).

¹¹ *Contrast with*, ISCR Case No. 14-00221 at 3 (App. Bd. June 29, 2016), where Board held that the judge committed reversible error by limiting their analysis to the resolution of the tax issues and, in doing so, "failed to assess adequately the overriding issues of Applicant's lack of judgment and his history of failing to abide by rules and regulations."

The guideline notes several disqualifying conditions that could raise a security concern under AG ¶ 16. The SOR alleges that Applicant falsified his SCA when he did not list the tax lien referenced in SOR 1.a., which raises the potential applicability of the disqualifying condition listed AG ¶ 16 (a), “deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire . . . used to determine security clearance eligibility”

The security clearance process is contingent upon the honesty of all applicants. It begins with the answers provided in the SCA and continues throughout the security clearance process. An applicant should disclose any potential derogatory information responsive to the questions asked on the SCA. However, the omission of material, adverse information standing alone is not enough to establish that an applicant intentionally falsified his or her SCA. An omission is not deliberate if the person genuinely forgot the information requested, inadvertently overlooked or misunderstood the question, or sincerely thought the information did not need to be reported. An administrative judge must examine the facts and circumstances surrounding the omission to determine an applicant’s true intent. See *generally*, ISCR Case No. 02-12586 (App. Bd. Jan. 25, 2005).

Applicant did not intentionally falsify his SCA when he omitted the information regarding his failure to file his 2009 and 2010 federal income tax returns, which eventually led to the tax lien referenced in SOR 1.a. He volunteered information regarding his troubled financial situation on the SCA, including reporting information that he arguably was not even required to report, i.e., planning on filing for bankruptcy. He immediately corrected the misinformation on the SCA regarding his tax-related problems just a month later, at the start of the background interview.¹² He then fully cooperated with the investigator, providing detailed and comprehensive information regarding his financial situation.

Applicant’s immediate and voluntary disclosure of his tax-related problems during the background interview provides strong circumstantial evidence that his failure to list the tax lien on the SCA was an innocent mistake. Furthermore, by volunteering his intent to file for bankruptcy on the SCA and disclosing his tax-related issues at the start of the background interview, Applicant demonstrated that he can be entrusted to reveal security-significant information no matter the potential personal cost. Accordingly, I find that AG ¶ 16(a) does not 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 all the relevant circumstances, to include the nine factors listed at AG ¶ 2(a). I hereby incorporate my above comments and note some additional whole-person factors.

¹² Cf., AG ¶ 17(a), “the individual made prompt, good-faith efforts to correct the omission . . . before being confronted with the facts.” See *also*, FORM, proposed facts, at 3 (“The language in the [Subject Interview] reflects . . . Applicant volunteered this information before being confronted with the facts.”).

Applicant's recent financial issues were a direct consequence of experiencing two major life events beyond his control in close proximity to one another. Specifically, in about 2010, Applicant's daughter was diagnosed with cancer and then, about two years later, Applicant's wife lost her well-paying job. The record evidence clearly demonstrates that when faced with significant financial setbacks, Applicant will address his debts in a manner expected of those granted access to classified information. He did so in the mid-1990's by paying his debts through a confirmed chapter 13 plan. More recently, he prioritized his debts; reached out to the IRS; and attempted to resolve his delinquent debts. He filed for bankruptcy only after his family's income decreased significantly and, then, only after receiving financial counseling. Even after filing for bankruptcy, Applicant addressed his sizeable tax debts outside of the bankruptcy process. He disclosed his financial trouble and intent to file for bankruptcy on his recent SCA, and was candid and cooperative throughout the ensuing investigation. Overall, the record evidence leaves me with no questions or doubts about Applicant's eligibility for continued access to classified information.

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 – 1.e:	For Applicant
Paragraph 2, Guideline E (Personal Conduct)	FOR APPLICANT
Subparagraph 2.a:	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 continued access to classified information. Applicant's request for a security clearance is granted.

Francisco Mendez
Administrative Judge