



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



In the matter of:

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ISCR Case No. 15-00881

Applicant for Security Clearance

Appearances

For Government: Aubrey M. De Angelis, Esq., Department Counsel
For Applicant: *Pro se*

08/22/2016

Decision

HARVEY, Mark, Administrative Judge:

The statement of reasons (SOR) alleges two federal income tax liens filed in 2011, totaling \$39,982. The SOR also alleges Applicant owes federal income taxes for tax years 2009 through 2011. He made some progress resolving his federal income tax debt; however, his history of owing federal income taxes continues to raise unresolved financial considerations security concerns. Access to classified information is denied.

History of the Case

On March 14, 2012, Applicant completed and signed a Questionnaire for National Security Positions (e-QIP) (SCA). (Government Exhibit (GE) 1) On November 20, 2015, the Department of Defense (DOD) Consolidated Adjudications Facility (CAF) issued an SOR to Applicant pursuant to Executive Order (Exec. Or.) 10865, *Safeguarding Classified Information Within Industry*, dated February 20, 1960, as amended; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), dated January 2, 1992, as amended; and the adjudicative guidelines (AG), which became effective on September 1, 2006.

The SOR detailed reasons why the DOD CAF could not make the affirmative finding that it is clearly consistent with the national interest to grant or continue a security clearance for him, and recommended referral to an administrative judge to determine whether a clearance should be granted, continued, denied, or revoked. (HE

2) Specifically, the SOR set forth security concerns arising under the financial considerations guideline.

On December 30, 2015, Applicant responded to the SOR and requested a hearing. On February 22, 2016, Department Counsel was ready to proceed. On March 21, 2016, the case was referred to me. On June 20, 2016, the Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing, setting the hearing for July 14, 2016. (HE 1) The hearing was held as scheduled.

During the hearing, Department Counsel offered five exhibits into evidence; Applicant offered five exhibits into evidence; and all exhibits were admitted without objection. (Tr. 17-20; Government Exhibit (GE) 1-5; Applicant Exhibit (AE) A-E) The transcript was received on July 22, 2016.

Findings of Fact

In Applicant's SOR response, he admitted the SOR allegations in ¶¶ 1.a, 1.b, and 1.c. Applicant's admissions are accepted as findings of fact.

Applicant is a 49-year-old satellite technician employed by a defense contractor, who is seeking to continue his security clearance. (Tr. 6, 9; SCA) He has been a satellite technician since 2007. (Tr. 9) His current salary is \$36 an hour. (Tr. 40) In 1986, he graduated from high school. (Tr. 7) He attended college for two years, and he did not receive a degree. (Tr. 8) He did not serve in the military. (Tr. 8) In 1981, he married, and in 2004, he divorced. (Tr. 9) His son was born in 2004. (GE 1) There is no evidence of violations of his employer's rules, criminal conduct, or abuse of alcohol or illegal drugs.

Financial Considerations

Applicant said he has owed almost \$80,000 to the IRS when interest and penalties are included. (Tr. 36) The SOR alleges and Applicant admitted that two tax liens were filed against him in 2011 for a total of \$39,982. He disclosed his federal income tax debt on his March 14, 2012 SCA. (GE 1)

In 2009, Applicant moved, and he changed tax preparation services. (Tr. 21-22) The new tax preparation service advised him to take 10 dependents on his W-4 form (the maximum number of dependents), which greatly reduced withholdings for the IRS in 2009 through 2011. (Tr. 22-26)

For tax year 2009, Applicant had only \$26 withheld from his pay, and he owed the IRS \$17,256. (Tr. 27, 48-49; GE 2) In 2010, he reached an agreement with the IRS to pay \$200 monthly beginning in 2010. (Tr. 27) Sometimes Applicant was out of the installment payment program because he "kind of defaulted on the payments." (Tr. 30-31) He had no explanation for why he defaulted. (Tr. 31) He was busy and he traveled extensively as part of his work. (Tr. 36-37)

On February 18, 2013, Applicant filed his 2010 and 2011 federal income tax returns. (Tr. 22, 28-30; GE 2 at 15, 18) As of November 2015, his account balance owed for tax year 2010 was \$27,885 and for tax year 2011 was \$15,886. (GE 2 at 15, 18)

Applicant timely filed his federal income tax returns for tax years 2012 through 2015. (Tr. 33) For tax years 2012 through 2015, he received the following federal income tax refunds: \$3,400—2012; \$2,094—2013; \$1,460—2014; and \$2,054—2015. (Tr. 31-32; AE A-C) He also received tax refunds from his state taxes for 2013 through 2015 ranging from \$617 to \$744. (AE A-C)

In October 2015, Applicant began making \$436 monthly payments to the IRS, and in November 2015, he decided to negotiate with the IRS to resolve his tax debt. (Tr. 35, 39; AE D) In June 2016, the Applicant and the IRS agreed to settle his tax debt for tax years 2008 through 2011 for \$11,148. (AE D) He was credited with payment of \$2,180 based on his \$436 monthly payments from October 2015. (AE D) His agreement requires him to pay \$8,533 within five months of May 26, 2016. (AE D) Applicant believed he could borrow the money from his bank to pay his IRS debt. (Tr. 49) He has minimal funds available in his checking and savings accounts. (Tr. 50-51)

Applicant understands the requirement to timely file and pay his federal and state taxes. (Tr. 46-47) He indicates he will ensure his future taxes are timely filed and paid.

Policies

The U.S. Supreme Court has recognized the substantial discretion of the Executive Branch in regulating access to information pertaining to national security emphasizing, “no one has a ‘right’ to a security clearance.” *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). As Commander in Chief, the President has the authority to control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to have access to such information.” *Id.* at 527. The President has authorized the Secretary of Defense or his designee to grant applicant’s eligibility for access to classified information “only upon a finding that it is clearly consistent with the national interest to do so.” Exec. Or. 10865, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960), as amended.

Eligibility for a security clearance is predicated upon the applicant meeting the criteria contained in the revised adjudicative guidelines. These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied in conjunction with an evaluation of the whole person. An administrative judge’s overarching adjudicative goal is a fair, impartial, and commonsense decision. An administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable.

The Government reposes a high degree of trust and confidence in persons with access to classified information. This relationship transcends normal duty hours and

endures throughout off-duty hours. Decisions include, by necessity, consideration of the possible risk the applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation about potential, rather than actual, risk of compromise of classified information. Clearance decisions must be “in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.” See Exec. Or. 10865 § 7. Thus, nothing in this Decision should be construed to suggest that I have based this decision, in whole or in part, on any express or implied determination about applicant’s allegiance, loyalty, or patriotism. It is merely an indication the applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

Initially, the Government must establish, by substantial evidence, conditions in the personal or professional history of the applicant that may disqualify the applicant from being eligible for access to classified information. The Government has the burden of establishing controverted facts alleged in the SOR. See *Egan*, 484 U.S. at 531. “Substantial evidence” is “more than a scintilla but less than a preponderance.” See *v. Washington Metro. Area Transit Auth.*, 36 F.3d 375, 380 (4th Cir. 1994). The guidelines presume a nexus or rational connection between proven conduct under any of the criteria listed therein and an applicant’s security suitability. See ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996).

Once the Government establishes a disqualifying condition by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. Directive ¶ E3.1.15. An applicant “has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance.” ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002). The burden of disproving a mitigating condition never shifts to the Government. See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005). “[S]ecurity clearance determinations should err, if they must, on the side of denials.” *Egan*, 484 U.S. at 531; see AG ¶ 2(b).

Analysis

Financial Considerations

AG ¶ 18 articulates the security concern relating to financial problems:

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 provides two disqualifying conditions that could raise a security concern and may be disqualifying in this case: “(a) inability or unwillingness to satisfy debts;” and

“(c) a history of not meeting financial obligations.” Applicant’s history of delinquent debt is documented in his SCA, SOR response, and hearing record. The SOR alleges and the record establishes two federal income tax liens filed in 2011, totaling \$39,982 and Applicant owes federal income taxes for tax years 2009 through 2011. The Government established the disqualifying conditions in AG ¶¶ 19(a), and 19(c), requiring additional inquiry about the possible applicability of mitigating conditions.

Five mitigating conditions under AG ¶ 20 are potentially applicable:

(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;¹ 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.

The Appeal Board concisely explained Applicant’s responsibility for proving the applicability of mitigating conditions as follows:

¹The Appeal Board has previously explained what constitutes a “good faith” effort to repay overdue creditors or otherwise resolve debts:

In order to qualify for application of [the “good faith” mitigating condition], an applicant must present evidence showing either a good-faith effort to repay overdue creditors or some other good-faith action aimed at resolving the applicant’s debts. The Directive does not define the term “good-faith.” However, the Board has indicated that the concept of good-faith “requires a showing that a person acts in a way that shows reasonableness, prudence, honesty, and adherence to duty or obligation.” Accordingly, an applicant must do more than merely show that he or she relied on a legally available option (such as bankruptcy) in order to claim the benefit of [the “good faith” mitigating condition].

(internal citation and footnote omitted) ISCR Case No. 02-30304 at 3 (App. Bd. Apr. 20, 2004) (quoting ISCR Case No. 99-9020 at 5-6 (App. Bd. June 4, 2001)).

Once a concern arises regarding an Applicant's security clearance eligibility, there is a strong presumption against the grant or maintenance of a security clearance. See *Dorfmont v. Brown*, 913 F. 2d 1399, 1401 (9th Cir. 1990), *cert. denied*, 499 U.S. 905 (1991). After the Government presents evidence raising security concerns, the burden shifts to the applicant to rebut or mitigate those concerns. See Directive ¶ E3.1.15. The standard applicable in security clearance decisions is that articulated in *Egan, supra*. "Any doubt concerning personnel being considered for access to classified information will be resolved in favor of the national security." Directive, Enclosure 2 ¶ 2(b).

ISCR Case No. 10-04641 at 4 (App. Bd. Sept. 24, 2013).

None of the mitigating conditions fully apply. Applicant's failure to timely pay his federal taxes in full raises a significant security concern. The IRS filed two federal income tax liens in 2011, totaling \$39,982 and Applicant owes federal income taxes for tax years 2009 through 2011. In June 2016, the Applicant and the IRS agreed to settle his tax debt for tax years 2008 through 2011 for \$11,148. He was credited with payment of \$2,180 based on his \$436 monthly payments from October 2015. His agreement requires him to pay \$8,533 within five months of May 26, 2016. He did not explain why he did not make more progress resolving his tax debts over the last four years. Financial considerations security concerns are not mitigated.

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 the 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 have incorporated my comments under Guideline F in my whole-person analysis. Some of the factors in AG ¶ 2(a) were addressed under Guideline F, but some warrant additional comment.

Applicant is a 49-year-old satellite technician employed by a defense contractor, who is seeking to continue his security clearance. He has been a satellite technician

since 2007. There is no evidence of violations of his employer's rules, criminal conduct, or abuse of alcohol or illegal drugs.

Applicant failed to withhold sufficient funds from his monthly salary for his federal income taxes. For tax year 2009, Applicant had only \$26 withheld from his pay, and he owed \$17,256. The IRS filed two federal income tax liens in 2011 against Applicant, totaling \$39,982. He owes federal income taxes for tax years 2009 through 2011. It is unclear how much he owes the IRS. His agreement with the IRS requires him to pay \$8,533 within five months of May 26, 2016, and if he does so, his federal income tax debt will be resolved.

Applicant failed to fully pay his federal income taxes from 2009 through 2011 in full when due.² He has been making periodic payments on his delinquent taxes for several years, and the IRS has been intercepting his income tax refunds; however, he owes an unspecified amount to the IRS. When an issue of delinquent taxes is involved, an administrative judge is required to consider how long an applicant waits to file their tax returns, whether the IRS generates the tax returns, and how long the applicant waits after a tax debt arises to begin and complete making payments.³ The primary problem here is that Applicant has owed thousands of dollars to the IRS since 2009. He did not prove his inability to make greater progress resolving his tax debts.

I have carefully applied the law, as set forth in *Egan*, Exec. Or. 10865, the Directive, and the AGs, to the facts and circumstances in the context of the whole person. Financial considerations concerns are not mitigated.

²See ISCR Case No. 14-03358 at 3, 5 (App. Bd. Oct. 9, 2015) (reversing grant of a security clearance, noting \$150,000 owed to the federal government, and stating "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.").

³See ISCR Case No. 14-05794 at 7 (App. Bd. July 7, 2016) (reversing grant of security clearance and stating, "His delay in taking action to resolve his tax deficiency for years and then taking action only after his security clearance was in jeopardy undercuts a determination that Applicant has rehabilitated himself and does not reflect the voluntary compliance of rules and regulations expected of someone entrusted with the nation's secrets."); ISCR Case No. 14-01894 at 2-6 (App. Bd. Aug. 18, 2015) (reversing grant of a security clearance, discussing lack of detailed corroboration of circumstances beyond applicant's control adversely affecting finances, noting two tax liens totaling \$175,000 and garnishment of Applicant's wages, and emphasizing the applicant's failure to timely file and pay taxes); ISCR Case No. 12-05053 at 4 (App. Bd. Oct. 30, 2014) (reversing grant of a security clearance, noting not all tax returns filed, and insufficient discussion of Applicant's efforts to resolve tax liens). More recently, in ISCR Case No. 14-05476 (App. Bd. Mar. 25, 2016) the Appeal Board reversed a grant of a security clearance for a retired E-9 and cited applicant's failure to timely file state tax returns for tax years 2010 through 2013 and federal returns for tax years 2010 through 2012. Before his hearing, he filed his tax returns and paid his tax debts except for \$13,000, which was in an established payment plan. The Appeal Board highlighted his annual income of over \$200,000 and discounted his non-tax expenses, contributions to DOD, and spouse's medical problems. The Appeal Board emphasized "the allegations regarding his failure to file tax returns in the first place stating, it is well settled that failure to file tax returns suggest that an applicant has a problem with complying with well-established government rules and systems. Voluntary compliance with such rules and systems is essential for protecting classified information." *Id.* at 5 (citing ISCR Case No. 01-05340 at 3 (App. Bd. Dec. 20, 2002) (internal quotation marks and brackets omitted).

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 through 1.c: Against Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with national security to grant or continue Applicant's eligibility for a security clearance. Eligibility for access to classified information is denied.

MARK HARVEY
Administrative Judge