



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



In the matter of:

Applicant for Security Clearance

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ISCR Case No. 15-01236

Appearances

For Government: David Hayes, Esquire, Department Counsel

For Applicant: *Pro se*

02/06/2017

Decision

GALES, Robert Robinson, Administrative Judge:

Applicant failed to mitigate the security concerns regarding financial considerations. Eligibility for a security clearance and access to classified information is denied.

Statement of the Case

On June 30, 2014, Applicant applied for a security clearance and submitted an Electronic Questionnaire for Investigations Processing (e-QIP) version of a Security Clearance Application.¹ On August 21, 2015, the Department of Defense (DOD) Consolidated Adjudications Facility (CAF) issued an SOR to him, under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended and modified; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended and modified (Directive); and the *Adjudicative Guidelines for Determining Eligibility For Access to Classified Information* (December 29, 2005) (AG) applicable to all adjudications and other determinations made under the Directive, effective September 1, 2006. The SOR alleged security concerns

¹ Item 2 (e-QIP, dated June 30, 2014).

under Guideline F (Financial Considerations), and detailed reasons why the DOD adjudicators were unable to find that it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. The SOR recommended referral to an administrative judge to determine whether a clearance should be granted, continued, denied, or revoked.

It is unclear as to when Applicant received the SOR as there is no receipt in the case file. Likewise, it is unclear when he actually responded to the SOR for there is an unsworn letter containing comments, dated September 8, 2015, as well as a forum request and notary public segment of the Answer which was initially dated as September 8, 2015, but which was redated as October 23, 2015. In that Answer, Applicant requested a hearing before an administrative judge.² On March 21, 2016, Applicant elected to have his case decided on the written record in lieu of a hearing.³ A complete copy of the Government's file of relevant material (FORM) was mailed to Applicant by the Defense Office of Hearings and Appeals (DOHA) on March 30, 2016, and he was afforded an opportunity, within a period of 30 days after receipt of the FORM, to file objections and submit material in refutation, extenuation, or mitigation. In addition to the FORM, Applicant was furnished a copy of the Directive as well as the Guidelines applicable to his case. Applicant received the FORM on April 4, 2016. Applicant's response was due on May 4, 2016, but to date, no response has been received. The case was initially assigned to another Administrative Judge but was reassigned to me on December 27, 2016.

Findings of Fact

In his Answer to the SOR, Applicant failed to use the words "admit" or "deny" to any of the allegations. However, based on his comments, I have concluded that he admitted two of the factual allegations pertaining to financial considerations (§§ 1.e. and 1.f.). Applicant's admissions and comments are incorporated herein as findings of fact. After a complete and thorough review of the evidence in the record, and upon due consideration of same, I make the following additional findings of fact:

Applicant is a 29-year-old employee of a defense contractor. He has been a security officer with the company since May 2014.⁴ He is a June 1986 high school graduate, with additional community college credits, but no degree.⁵ Applicant served on active duty with the U.S. Army from September 2006 until he was honorably discharged in January 2011.⁶ He failed to submit any additional information pertaining to his period of active duty. In this regard, there are no identified awards and decorations. He mentioned one deployment, but did not supply any further information regarding it. He

² Item 1 (Applicant's Answer to the SOR, dated September 8, 2015 and October 23, 2015).

³ Item 6 (Forum Request, dated March 21, 2016).

⁴ Item 2, *supra* note 1, at 13.

⁵ Item 2, *supra* note 1, at 12-13.

⁶ Item 2, *supra* note 1, at 17-18.

was granted a secret security clearance in November 2006.⁷ Applicant has never been married, but he has had a cohabitant since June 2013.⁸

Financial Considerations⁹

There was nothing unusual about Applicant's finances until he left active duty in January 2011. In May 2011 he enrolled in college, where he remained until May 2013. At the same time, Applicant claimed he was unemployed until May 2013.¹⁰ Applicant did not offer any explanations regarding the actual nature of his unemployment, any efforts to seek employment, how he managed to survive financially during his period of unemployment, or the effects of his unemployment. At some point, a variety of accounts became delinquent, and Applicant failed to timely file his federal income tax return for the tax year 2010 because he "forgot" to do so. He did not attribute his delinquent accounts to any specific factors.

In addition to the allegation related to the unfiled federal income tax return for the tax year 2010, the SOR identified five purportedly delinquent debts that had been placed for collection or charged off, as generally reflected by the July 2014 credit report¹¹ and the August 2015 credit report.¹² Those debts, totaling \$10,084, their current status, according to the credit reports, other evidence submitted by the Government, and Applicant's comments regarding same, are described below.

Applicant contends that he paid off three of the five delinquent accounts: (SOR ¶ 1.a.) a utility account with a past due and unpaid balance of \$125;¹³ (SOR ¶ 1.b.) a bank credit card account with a past due and unpaid balance of \$428;¹⁴ and (SOR ¶ 1.c.) a cell phone account with a past due and unpaid balance of \$1,233 that was sold to a debt purchaser.¹⁵ Applicant failed to submit any documentation to support his contention that he made any payments to the identified creditors, or that he had paid off or settled any of

⁷ Item 2, *supra* note 1, at 35.

⁸ Item 2, *supra* note 1, at 21.

⁹ General source information pertaining to the financial accounts discussed below can be found in the following exhibits: Item 2, *supra* note 1; Item 3 (Personal Subject Interview, dated August 15, 2014); Item 4 (Combined Experian, TransUnion, and Equifax Credit Report, dated July 11, 2014); Item 5 (Equifax Credit Report, dated June 3, 2015).

¹⁰ Item 2, *supra* note 1, at 12, 15.

¹¹ Item 4, *supra* note 9.

¹² Item 5, *supra* note 9.

¹³ Item 1 (Applicant's Answer to the SOR), *supra* note 2; Item 4, *supra* note 9, at 5; Item 5, *supra* note 9, at 1; Item 3, *supra* note 9, at 5.

¹⁴ Item 1 (Applicant's Answer to the SOR), *supra* note 2; Item 4, *supra* note 9, at 5; Item 5, *supra* note 9, at 1; Item 3, *supra* note 9, at 5; Item 2, *supra* note 1, at 37-38.

¹⁵ Item 1 (Applicant's Answer to the SOR), *supra* note 2; Item 4, *supra* note 9, at 6; Item 5, *supra* note 9, at 3; Item 3, *supra* note 9, at 5.

the accounts in question. In the absence of such documentation, there is insufficient evidence to conclude that the accounts have been resolved.

Applicant acknowledged that he had not yet focused on the two remaining accounts because he had insufficient funds to do so. One was an automobile loan for a 2007 Cadillac was placed for collection before it was repossessed (SOR ¶ 1.d.). The remaining unpaid \$7,876 balance was charged off.¹⁶ The other was a bank credit card with an unpaid balance of \$422 that Applicant identified during his August 2014 interview with an investigator from the U.S. Office of Personnel Management (OPM), but which he later claimed to have no knowledge about because it was no longer listed in his more recent credit report (SOR ¶ 1.e.).¹⁷ Applicant stated that he intended to file his federal income tax return for 2010 when he files his federal income tax return for the tax year 2015.¹⁸ He failed to submit any documentation that he had done so.

Applicant did not submit a Personal Financial Statement to reflect his net monthly income; monthly expenses; or any monthly remainder which might be available for discretionary spending or savings. There is no evidence of a budget. There is no evidence of any financial counseling. It appears that Applicant's finances are not yet under control.

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."¹⁹ 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. The President has authorized the Secretary of Defense or his designee to grant an applicant eligibility for access to classified information "only upon a finding that it is clearly consistent with the national interest to do so."²⁰

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the AG. In addition to brief introductory explanations for each guideline, the AG list potentially disqualifying conditions and mitigating conditions, which are used in evaluating an applicant's eligibility for access to classified information.

¹⁶ Item 1 (Applicant's Answer to the SOR), *supra* note 2; Item 4, *supra* note 9, at 5; Item 5, *supra* note 9, at 3; Item 3, *supra* note 9, at 4-5.

¹⁷ Item 1 (Applicant's Answer to the SOR), *supra* note 2; Item 4, *supra* note 9, at 8; Item 3, *supra* note 9, at 5.

¹⁸ Item 1 (Applicant's Answer to the SOR), *supra* note 2.

¹⁹ *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988).

²⁰ Exec. Or. 10865, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960), as amended and modified.

An administrative judge need not view the guidelines as inflexible, ironclad rules of law. Instead, acknowledging the complexities of human behavior, these guidelines are applied in conjunction with the factors listed in the adjudicative process. The administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense decision. The entire process is a conscientious scrutiny 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 meaningful decision.

In the decision-making process, facts must be established by "substantial evidence."²¹ The Government initially has the burden of producing evidence to establish a potentially disqualifying condition under the Directive, and has the burden of establishing controverted facts alleged in the SOR. Once the Government has produced substantial evidence of a disqualifying condition, under Directive ¶ E3.1.15, the applicant has the burden of persuasion to present evidence in refutation, explanation, extenuation or mitigation, sufficient to overcome the doubts raised by the Government's case. The burden of disproving a mitigating condition never shifts to the Government.²²

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 and endures throughout off-duty hours as well. It is because of this special relationship that the Government must be able to repose a high degree of trust and confidence in those 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 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. Furthermore, "security clearance determinations should err, if they must, on the side of denials."²³

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."²⁴ 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 as to Applicant's allegiance, loyalty, or patriotism. It is merely an indication the Applicant has or has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance. 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.

²¹ "Substantial evidence [is] such relevant evidence as a reasonable mind might accept as adequate to support a conclusion in light of all contrary evidence in the record." ISCR Case No. 04-11463 at 2 (App. Bd. Aug. 4, 2006) (citing Directive ¶ E3.1.32.1). "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).

²² See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).

²³ *Egan*, 484 U.S. at 531.

²⁴ See Exec. Or. 10865 § 7.

Analysis

Guideline F, Financial Considerations

The security concern relating to the guideline for Financial Considerations is set out in 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 guideline notes several conditions that could raise security concerns. Under AG ¶ 19(a), an "inability or unwillingness to satisfy debts" is potentially disqualifying. Similarly, under AG ¶ 19(c), "a history of not meeting financial obligations" may raise security concerns. Under AG ¶ 19(g), security concerns may be raised when there is a "failure to file annual Federal, state, or local income tax returns as required or the fraudulent filing of the same." Applicant's financial problems initially arose in January 2011, and increased during the ensuing years. Accounts became delinquent. A vehicle was repossessed. He failed to timely file his federal income tax return for the tax year 2010. AG ¶¶ 19(a), 19(c), and 19(g) apply.

The guideline also includes examples of conditions that could mitigate security concerns arising from financial difficulties. Under AG ¶ 20(a), the disqualifying condition may be mitigated where "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." Also, under AG ¶ 20(b), financial security concerns may be mitigated where "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." Evidence that "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" is potentially mitigating under AG ¶ 20(c). Similarly, AG ¶ 20(d) applies where the evidence shows "the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts."²⁵

²⁵ The 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 [or statute of limitations]) in order to claim the benefit of [the "good-faith" mitigating condition].

AG ¶ 20(b) minimally applies. AG ¶¶ 20(a), 20(c), and 20(d) do not apply. As noted above, Applicant left active duty in January 2011, enrolled in college in May 2011, and claimed he was unemployed (while attending college) until May 2013. He did not attribute his delinquent accounts to any specific factors. He failed to timely file his federal income tax return for the tax year 2010 because he “forgot” to do so – hardly a factor largely beyond his control, and an oversight that could have been remedied after his August 2014 OPM interview.

The record establishes that Applicant failed to timely file his federal income tax return for tax year 2010. The DOHA Appeal Board has commented:²⁶

Failure to file tax returns suggests that an applicant has a problem with complying with well-established governmental rules and systems. Voluntary compliance with such rules and systems is essential for protecting classified information. ISCR Case No. 01-05340 at 3 (App. Bd. Dec. 20, 2002). As we have noted in the past, a clearance adjudication is not directed at collecting debts. See, e.g., ISCR Case No. 07-08049 at 5 (App. Bd. Jul. 22, 2008). By the same token, neither is it directed toward inducing an applicant to file tax returns. Rather, it is a proceeding aimed at evaluating an applicant’s judgment and reliability. *Id.* A person who fails repeatedly to fulfill his or her legal obligations does not demonstrate the high degree of good judgment and reliability required of those granted access to classified information. See, e.g., ISCR Case No. 14-01894 at 5 (App. Bd. Aug. 18, 2015). See *Cafeteria & Restaurant Workers Union Local 473 v. McElroy*, 284 F.2d 173, 183 (D.C. Cir. 1960), *aff’d*, 367 U.S. 886 (1961).

Applicant has procrastinated since May 2014, when he obtained his current position, to resolve his delinquent debts. He offered no documentary evidence of a good-faith effort to resolve any of his accounts. He contended he entered into at least one settlement and had paid off some creditors, but he failed to submit any documentation such as receipts, cancelled checks, account records, etc., to support his contentions. There is no evidence that Applicant took any positive action to resolve his accounts either before or since his August 2014 OPM interview. There is no evidence of a budget, financial counseling, or that his finances are under control. In failing to timely file his 2010 federal income tax return and resolve his long-standing delinquent debt, Applicant

(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)).

²⁶ ISCR Case No. 14-04437 at 3 (App. Bd. Apr. 15, 2016). See ISCR Case No. 14-05476 at 5 (App. Bd. Mar. 25, 2016) (citing ISCR Case No. 01-05340 at 3 (App. Bd. Dec. 20, 2002)). ISCR Case No. 14-01894 at 4-5 (App. Bd. Aug. 18, 2015). The Appeal Board clarified that even in instances where an “[a]pplicant has purportedly corrected [the applicant’s] federal tax problem, and the fact that [applicant] is now motivated to prevent such problems in the future, does not preclude careful consideration of [a]pplicant’s security worthiness in light of [applicant’s] longstanding prior behavior evidencing irresponsibility” including a failure to timely file federal income tax returns. See ISCR Case No. 15-01031 at 3 and note 3 (App. Bd. June 15, 2016) (characterizing “no harm, no foul” approach to an Applicant’s course of conduct and employed an “all’s well that ends well” analysis as inadequate to support approval of access to classified information with focus on timing of filing of tax returns after receipt of the SOR).

appears to have acted imprudently and irresponsibly. Applicant's actions, or inactions, under the circumstances confronting him, continue to cast doubt on his current reliability, trustworthiness, and good judgment.²⁷

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. Moreover, I have evaluated the various aspects of this case in light of the totality of the record evidence and have not merely performed a piecemeal analysis.²⁸

There is some evidence in favor of mitigating Applicant's conduct. There is no evidence of misuse of information technology systems, mishandling protected information, or substance abuse. He is an honorably discharged former member of the U.S. Army. He candidly acknowledged having some financial difficulties when he completed his e-QIP.

The disqualifying evidence under the whole-person concept is simply more substantial. As noted above, Applicant's explanation for his failure to comply with the law related to the timely filing of his federal income tax return is simply too simplistic. He may have forgotten to meet the original filing date in April 2011, but he continued to ignore his filing responsibilities for approximately five years thereafter, even after he was repeatedly reminded of his failure. He offered no meaningful explanations for his failure to maintain his accounts in a current status. Based on the evidence presented, Applicant failed to take any positive action to resolve his accounts. There is no evidence of a budget, financial counseling, or that his finances are under control.

²⁷ See ISCR Case No. 09-08533 at 3-4 (App. Bd. Oct. 6, 2010).

²⁸ See *U.S. v. Bottone*, 365 F.2d 389, 392 (2d Cir. 1966); See also ISCR Case No. 03-22861 at 2-3 (App. Bd. Jun. 2, 2006).

Overall, the evidence leaves me with substantial questions and doubts as to Applicant's security worthiness. For all of these reasons, I conclude Applicant has failed to mitigate the security concerns arising from his financial considerations. See AG ¶ 2(a)(1) through AG ¶ 2(a)(9).

Formal Findings

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

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

ROBERT ROBINSON GALES
Administrative Judge