



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



In the matter of:)	
)	
REDACTED)	ISCR Case No. 15-01702
)	
Applicant for Security Clearance)	

Appearances

For Government: Eric H. Borgstrom, Esq., Department Counsel
For Applicant: *Pro se*

07/26/2016

Decision

MENDEZ, Francisco, Administrative Judge:

Applicant mitigated security concerns raised by the accumulation of delinquent debt. He started addressing and resolving his delinquent debts in 2010, about two years before submitting his recent security clearance application. Clearance is granted.

History of the Case

On September 1, 2015, the Department of Defense (DOD) Consolidated Adjudications Facility (CAF) sent Applicant a Statement of Reasons (SOR) alleging that his circumstances raised security concerns under the financial considerations guideline.¹ On October 20, 2015, Applicant answered the SOR and requested a hearing to establish his continued eligibility for access to classified information (Answer).

¹ This action was taken under Executive Order (E.O.) 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the Adjudicative Guidelines (AG) implemented by the Department of Defense on September 1, 2006.

On May 2, 2016, the Defense Office of Hearings and Appeals (DOHA) issued a notice scheduling the hearing for June 9, 2016.² The hearing was convened as scheduled. Applicant testified and I admitted, without objection, Government exhibits (Gx.) 1 – 7 and Applicant's exhibits (Ax.) 1 – 6. The hearing transcript (Tr.) was received by DOHA on June 20, 2016.

Findings of Fact

Applicant is in his mid-fifties. He served in the U.S. military from 1979 to 1985. He married his wife in 1987. He has a master's degree in electrical engineering and has been with his current employer since 1996. Currently, he is a senior systems engineer, earning an annual salary of approximately \$110,000. He has received several awards and commendations for his work. (Tr. 25-29, 55; Ax. 2 – 4) Applicant's recent performance appraisal reflects he exceeds expectations and his supervisor wrote that:

[Applicant] can always be counted on to deliver timely and thorough work. . . . [He] is respected by co-workers as someone who works unselfishly and always meets team's goals. [He] is a responsible team member who takes responsibility for his work. He always accepts accountability for his decisions. (Ax. 1 at 8)

Applicant, in his off time, has been engaged in online investment trading. He caps his investment trading to \$5,000 to \$10,000. He had significant gains from his online trading in 2008, 2009, and 2011. He was unable to pay the resulting tax liability because he was using his excess income to assist a niece, who was a single mother raising a child on her own. Also, he was using his excess income to pay increased real estate taxes resulting from an improperly conducted assessment that inflated the property value of his home.

Applicant filed his 2008 and 2009 tax returns in November 2010. At hearing, Applicant voluntarily provided his IRS account transcripts, which show that he owed approximately \$24,500 in taxes for both years and withheld about \$17,000 in taxes from his wages. He entered into an installment agreement with the IRS and has been paying \$350 on a consistent monthly basis since January 2011. He has satisfied all past-due amounts owed for the 2008 tax year and, as of March 2016, owed approximately \$3,600 for the 2009 tax year.

Applicant filed his 2011 tax year tax return in April 2014. He owed about \$14,000 in taxes and had approximately \$8,900 in taxes deducted from his wages. He paid the remaining nearly \$8,000 in taxes and penalties in May 2014. Applicant's IRS account transcripts reveal that he has timely filed his tax returns for tax years 2012 – 2014. He has voluntarily deducted more in taxes from his wages to satisfy his past-due taxes. He voluntarily disclosed his past tax problems on his current security clearance application

² Prehearing scheduling correspondence, notice of hearing, and case management order were marked and attached to the record as Hearing Exhibits (Hx.) I – III, respectively.

(SCA), which he submitted in November 2012. Applicant's failure to timely file and pay his 2008, 2009, 2011 taxes are listed in SOR 1.a – 1.c. (Tr. 29-40, 50-58; Gx. 1; Ax. 6)³

Applicant, while financially assisting his niece and paying the inflated real estate taxes, amassed some delinquent consumer-related debt. He disclosed these debts on his SCA, to include a delinquent \$16,000 credit card account referenced in SOR 1.d. He satisfied the \$16,000 debt in 2011. He testified that he used the excess income he gained from his online trading to pay his other debts, which contributed to his inability to pay his resulting tax liability. He then waited to file his 2011 tax year tax return until he had saved up enough money to pay his taxes. His current credit report does not reflect any delinquent accounts. (Tr. 24-25, 38-40; Gx. 6)⁴

Applicant succeeded in appealing the inflated property tax assessment. He estimates that he paid about \$500 more a month in property taxes for about 3 years before successfully overturning the assessment in about late 2011 or early 2012. He stopped financially supporting his niece in late 2015, early 2016. He has not held a credit card for many years and only uses a debit card for purchases. He has set aside a small pool of money to offset any tax liability resulting from any potential gains he may realize through his online trading. (Tr. 45-50)

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.

³ See also, Tr. 16-17 (Department Counsel, in opening statement, concedes that Applicant filed his 2008 and 2009 tax returns in November 2010 and has been paying on consistent monthly basis since 2011. Department Counsel also conceded that Applicant filed and paid his 2011 taxes in early 2014.)

⁴ See also, Tr. 17 (Department Counsel, in opening statement, concedes that Applicant paid the \$16,000 debt referenced in SOR 1.d in either August or October 2011.)

Administrative Judges are responsible for ensuring that an applicant receives fair notice of the issues raised, has a reasonable opportunity to litigate those issues, and is not subjected to unfair surprise. ISCR Case No. 12-01266 at 3 (App. Bd. Apr. 4, 2014). In resolving the ultimate question regarding an applicant's eligibility, an administrative judge must resolve "[a]ny doubt concerning personnel being considered for access to classified information . . . in favor of national security." AG ¶ 2(b). Moreover, recognizing the difficulty at times in making suitability determinations and the paramount importance of protecting national security, the Supreme Court has held that "security clearance determinations should err, if they must, on the side of denials." *Egan*, 484 U.S. at 531.

A person who seeks access to classified information enters into a fiduciary relationship with the Government predicated upon trust and confidence. This relationship transcends normal duty hours. The Government reposes a high degree of trust and confidence in individuals to whom it grants access to classified information. Decisions include, by necessity, consideration of the possible risk an applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation of potential, rather than actual, risk of compromise of classified information.

Analysis

Guideline F, Financial Considerations

The security concern under this guideline is explained at AG ¶ 18:

Failure or inability to live within one's means, satisfy debts, and meet financial obligations may indicate poor self-control, lack of judgment, or unwillingness to abide by rules and regulations, all of which can raise questions about an individual's reliability, trustworthiness and ability to protect classified information. An individual who is financially overextended is at risk of having to engage in illegal acts to generate funds.

The financial considerations security concern is not limited to a consideration of whether an individual with financial problems might be tempted to compromise classified information or engage in other illegality to pay their debts. It also addresses the extent to which an individual's delinquent debts cast doubt upon their judgment, self-control, and other qualities essential to protecting classified information.⁵

Applicant's accumulation of delinquent debt 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."

⁵ ISCR Case No. 11-05365 at 3 (App. Bd. May. 1, 2012).

Additionally, Applicant's failure to timely file his 2008, 2009, and 2011 taxes 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." Due to his past failure to timely file and pay his taxes, Applicant bears a heavy burden in mitigating the financial considerations security concern.⁶

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;

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.

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.⁷ 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 raises 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.

Applicant's financial problems were, in part, due to an inflated property tax assessment. He used a portion of his monetary gain from his online investment trading to pay his inflated property taxes, but was then unable to pay the income taxes on those gains. Applicant did not simply sit back and do nothing until his federal tax situation became a security concern. Instead, in 2010, about two years before submitting his

⁶ See *generally*, ISCR Case No. 14-03358 at 3 (App. Bd. Oct. 9, 2015) (Board explained the heightened security concerns raised by tax-related financial issues, as follows: "A security clearance represents an obligation to the Federal Government for the protection of national secrets. Accordingly failure to honor other obligations to the Government has a direct bearing on an applicant's reliability, trustworthiness, and ability to protect classified information.").

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

SCA and initiating the current security clearance review, Applicant took action to address and resolve his delinquent debt. He filed his overdue tax returns and entered into an installment agreement with the IRS to pay his outstanding tax obligation. In 2011, Applicant paid other past-due debts, to include a sizeable credit card debt referenced in SOR 1.d. However, due to Applicant's failure to timely file and pay his income taxes that were due in April 2012, I cannot extend full application of AG ¶¶ 20(a) and 20(b).

Applicant did establish the full applicability of AG ¶¶ 20(c) and 20(d). In April 2014, or over a year before the SOR was issued, Applicant filed his overdue tax return for tax year 2011 and satisfied the taxes and associated penalties. From January 2011 to the present day, he paid on a consistently monthly basis his outstanding tax liability per the monetary terms of the IRS installment agreement. He timely filed his past three federal income tax returns and paid the taxes owed. Applicant's demonstrated track record of responsibly addressing and resolving financial issues, which when coupled with the whole-person factors⁸ present in this case, including nearly three decades of holding a security clearance without issue, provide a reasonable degree of confidence that he will continue to responsibly handle his financial and security obligations.

Applicant's past tax issues were not due to procrastination,⁹ indifference or intentional refusal to comply with tax laws.¹⁰ Instead, his past tax issues were, in part, due to matters beyond his control. He filed his overdue federal tax returns and either paid or is paying his federal tax debt. Applicant's resolution of the federal tax issue 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, I considered the timing of when Applicant took action to resolve his financial problems and his demonstrated track record of responsibly addressing his debts. Accordingly, I find that Applicant carried his heavy burden of proof and persuasion in mitigating security concerns raised by his past financial circumstances and establishing his continued eligibility for access to classified information.

⁸ See, AG ¶ 2(a).

⁹ See, e.g., ISCR Case No. 14-00221 (App. Bd. June 29, 2016).

¹⁰ See, e.g., ISCR Case No. 98-0761 (App. Bd. Dec. 27, 1999).

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 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."

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.d: 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