



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



In the matter of:)	
)	
[REDACTED])	ISCR Case No. 15-02040
)	
Applicant for Security Clearance)	

Appearances

For Government: Andre M. Gregorian, Esq., Department Counsel
For Applicant: Kristan A. Siegwart, Esq.

11/22/2016

Decision

HESS, Stephanie C., Administrative Judge:

This case involves security concerns raised under Guideline F (Financial Considerations). Applicant has not established a sufficient track record of debt resolution or financial responsibility since his May 2014 Chapter 7 bankruptcy discharge. Eligibility for access to classified information is denied.

Statement of the Case

Applicant submitted a security clearance application (e-QIP) on May 15, 2014. On October 17, 2015, the Department of Defense (DOD) sent him a Statement of Reasons (SOR), alleging security concerns under Guideline F. The DOD acted under Executive Order (Ex. Or.) 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG) implemented by DOD on September 1, 2006.

Applicant answered the SOR on November 20, 2015, designated his attorney, and requested a hearing before an administrative judge. Department Counsel was ready to proceed on December 23, 2015, and the case was assigned to me on

February 25, 2016. On March 29, 2016, the Defense Office of Hearings and Appeals (DOHA) notified Applicant's counsel that the hearing was scheduled for May 5, 2016. I convened the hearing as scheduled. Government Exhibits (GX) 1 through 8 were admitted in evidence without objection. Applicant testified and submitted Applicant's Exhibit (AX) A through M, which were admitted without objection. DOHA received the transcript (Tr.) on May 18, 2016.

Findings of Fact

The SOR alleges that Applicant owes \$23,686 in unpaid state taxes, \$34,479 in unpaid Federal taxes, and that he did not pay state and Federal taxes as required for tax years 2009 through 2013. Applicant denied these allegations. The SOR also alleges that Applicant filed Chapter 13 bankruptcy in October 2013, which was dismissed in November 2013, and that he filed Chapter 7 bankruptcy in May 2014, which was discharged in September 2014. He admits these allegations, but states that there are mitigating circumstances. Applicant's admissions in his Answer are incorporated in my findings of fact.

Applicant is a 41-year-old strategic planner employed by a defense contractor since May 2003. He received a bachelor's degree in electrical engineering in 1999, a master's degree in electrical engineering in 2005, and is currently enrolled in a dual-master's degree program, with an anticipated graduation date of December 2016. (GX 1; Tr. 22-23.) He and his wife married in July 2004 and have two children, ages nine and six. (GX 1.) He has held a security clearance since 2003, and previously held a clearance while working as an intern for another defense contractor in 1997. (Tr. 25.)

In 2004, Applicant and his wife started a real-estate-investment limited liability corporation (LLC). "[T]he premise of the business was that we built a property ladder to build a portfolio of rental properties and have those rental properties generate income as well as equity for us." (Tr. 26.) In August 2004, they purchased a house for approximately \$270,000, lived in it for one year, and then rented it out. The monthly mortgage payment was \$780. (Tr. 52.) The rental income on the house from 2005 until 2007 was about \$680 per month. (Tr. 54.) Between 2006 and 2007, Applicant missed at least two mortgage payments, and the house was foreclosed in 2007. (Tr. 58-59.) There was a deficiency balance of about \$30,000, on which Applicant made monthly payments, and ultimately settled the debt in April 2012, having paid a total of \$9,650. (Tr. 32; AX G.)

In August 2005, Applicant purchased a second house for about \$406,000, with an adjustable interest rate (ARM) on the mortgage loan. (Tr. 32; GX 6.) However, he did not purchase the second house through the LLC, but instead, Applicant personally borrowed the money. (Tr. 53.) He also took out a home equity loan in August 2005 for about \$35,000. (GX 6; GX 4.) Initially, the monthly mortgage payment was about \$2,500, adjusted to about \$4,800 for an unspecified period of time, and was \$2,895 in July 2012. (Tr. 33; AX H.)

Between August 2011 and August 2014, Applicant sent numerous letters to and participated in multiple telephone conversations with representatives of the mortgage lender, seeking a loan modification due to financial hardship. (AX H.) At some unspecified date in about 2012, Applicant was advised by the mortgage lender that in order for the loan to be considered for modification, it had to be delinquent, and Applicant stopped making mortgage payments. (Tr. 34; Tr. 61.) He continued to live in the house until at least May 2014. (GX 1.)

In the first letter of August 2011, Applicant stated that he and his wife opened a small business and were “rewarded with substantial business losses that have further eroded our financial stability.” Applicant also cited a loss of income over the previous two years due to cuts in Federal spending that reduced his overtime, the recent birth of a daughter, and increased medical expenses for his wife and children, as factors that contributed to his financial hardship. (AX H.)

In November 2011, in addition to restating the factors causing his financial difficulties, Applicant stated that he and his wife started two small businesses and were sustaining a monthly loss in rental income of \$2,295, and a monthly business expense of \$300. He repeated these claimed losses in his March 2012 letter. (AX H.)

The May 2012 letter referenced errors made by the mortgage lender in assessing Applicant’s monthly income, and requested reconsideration of the apparent denial of a loan modification. According to Applicant, the lender erroneously assessed Applicant’s gross monthly income at \$13,100, then, following a review at Applicant’s request, at \$11,237. However, Applicant asserted that his monthly household income was \$10,372. In the July 31, 2012, letter, Applicant requested another review, this time stating that his monthly household income was reported as \$12,212 then as \$16,546, when it was actually \$10,671, “minus marginal/irregular overtime pay.” (AX H.)

In the December 2012 letter, Applicant asserted that he and his wife reduced their monthly expenses in response to “dramatic changes in our family and decreased income level.” He also stated that in 2012, they had “received approximately \$15,000 in overtime pay, plus an approximate \$4,000 in bonuses.” (AX H.)

Applicant sent the final letter in August 2014, despite the fact that the mortgage loan modification was denied in May 2014 and subsequently included in Applicant’s Chapter 7 Bankruptcy filing that same month. The debt was discharged in September 2014. (AX H; GX 3.) The loan modification was ultimately denied in May 2014. (Tr. 69.)

At some point between 2007 and 2009, Applicant established a real estate management company as an LLC to manage one rental room in his house, which he rented to his mother. He had a space in his house designated as office space to operate this LLC. (Tr. 84.) The \$2,295 monthly loss in rental income, referenced by Applicant in his letters to the mortgage lender, was due to Applicant’s mother’s rental payment that she was not paying while she was deployed in Iraq. (Tr. 64.) He closed this business in

about 2010. (Tr. 86.) Applicant operated an online business for six months in 2011, and the total loss from the monthly expenses of \$300 was about \$1,800. (Tr. 77.)

In the fall of 2005, the original LLC invested \$5,000, with several other investors, to purchase another property, as an “investment opportunity” from which they expected to achieve a return on their investment in about six months. (Tr. 29; 57.) The person who initiated this plan embezzled the money from the investors. Applicant sued him and won. Applicant was awarded over \$10,000, of which he received monthly payments totaling approximately \$7,000 over an unspecified period of time. (Tr. 58.) Applicant cited this loss of money as a contributing factor to his financial woes in his January 2013 letter to the mortgage lender. (AX H.)

Regarding his financial circumstances that caused him to seek a mortgage loan modification, Applicant testified that:

[T]he reason we had financial hardships in 2012 was stemming from the losses that we suffered from the business. We were still making payments through deficiency. We had, you know, monies that, you know, were embezzled from us. And we also - I'm not sure if the timeline is just right, but we also had been audited. We owed monies to, you know, the state and federal taxes. (Tr. 63.)

Applicant also stated that, “...the amount of bills we owed depleted our income and created a situation that was difficult to make the mortgage payment.” (Tr. 65.)

Applicant further testified that none of the debts he owed, with the exception of the mortgage loan and the line of credit, were delinquent when he filed bankruptcy, but that he was required to include them. (Tr. 35-36.) However, the May 2014 credit bureau report shows that three credit-card accounts were charged off, totaling \$8,297, and these accounts were included in the bankruptcy. (GX 1; GX 4.) The amount of debt discharged on the mortgage loan was \$405,099, and on the home equity loan was \$33,018. (GX 4; GX 3.) Applicant stated the mortgage loan liability was the primary reason that he filed bankruptcy. (Tr. 66.)

Applicant testified that he learned about calculating his LLC’s taxes, specifically how to claim business-related deductions, by reading books, visiting websites, and using tax software. (Tr. 40.) In 2012, Applicant was audited by the Internal Revenue Service (IRS) for tax years 2009, 2010, and 2011, and a number of his claimed business-related deductions were completely disallowed. (Tr. 39; Tr. 41.) For example, Applicant and his wife, when visiting her family about twice a year in Texas, would look at potential investment properties and then claim portions of the trip expenses, such as mileage and travel costs, as business expenses. (Tr. 76.) The IRS also disallowed other expenses claimed by Applicant. Applicant successfully disputed a few thousand dollars of the expenses initially disallowed by the IRS, including office supplies and the designated office space in Applicant’s home used for the real estate management business. (Tr. 74; Tr. 84.) However, the total Federal taxes owed for tax years 2009,

2010, and 2011 following the audit was approximately \$34,479. (Tr. 39.) The total state taxes owed was approximately \$23,686. He and his wife did not have any taxes withheld from their paychecks from 2009 until 2011 because they used the expenses of the LLCs to pass the taxes through. (Tr. 75-76; Tr. 40.)

Applicant is repaying his Federal and state tax debts through installment plans. Additionally, he rolled the taxes he owed for tax years 2012 and 2013 into the installment plans. (Tr. 42.) As of November 25, 2015, the balance owed on his Federal tax debt was \$26,028. (AX B.) The balance owed on his state tax debt, as of December 28, 2015, is \$19,731. (AX A.) Applicant's installment payments were suspended between filing for bankruptcy and the discharge. (Tr. 42.) Since the 2012 audit, he hired an accountant annually to prepare and file his taxes. Applicant and his wife now have taxes withheld from their paychecks. (AX D; Tr. 84.)

Applicant and his wife completed the online credit-counseling required by their 2013 and 2014 bankruptcy filings. (AX F.) According to his personal financial statement (PFS), dated May 16, 2016, Applicant's gross monthly household income is \$11,034, and his "Deductions/Allotments" are \$5,009. There is no record evidence explaining what expenditures are included in the withholdings. The household's net income is \$8,525. After all other monthly expenses, the household net remainder is \$1,402. The balance of his checking account is \$768, and the balance of his savings account is \$1,670. He has credit-card balances totaling \$7,330, on which he makes monthly payments of \$227. He has \$99,975 in his retirement account. (AX E.) His PFS reflects the approximately 30% raise he received in March 2016. (Tr. 24.) He testified that he currently lives within his means. (Tr. 71.)

Applicant received positive performance reviews for 2013, 2014, and 2015, a \$1,000 performance award in 2014, and an award in 2009. (AX J; AX K; AX I.) He completed several course requirements offered by his employer. (AX M.) A co-worker and one-time supervisor of Applicant who has known him for about four years, finds him to be trustworthy and committed to security. (AX I.)

Policies

"[N]o 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 applicants 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's meeting the criteria contained in the AG. These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, an administrative judge applies these

guidelines 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 and 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 that 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 made "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, a decision to deny a security clearance 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. 92-1106 at 3, 1993 WL 545051 at *3 (App. Bd. Oct. 7, 1993).

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 burden of proving a mitigating condition, and the burden of disproving it never shifts to the Government. See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).

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). "[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

Guideline F, Financial Considerations

The concern under this guideline 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.

This concern is broader than the possibility that an individual might knowingly compromise classified information in order to raise money. It encompasses concerns about an individual's self-control, judgment, and other qualities essential to protecting classified information. An individual who is financially irresponsible may also be irresponsible, unconcerned, or negligent in handling and safeguarding classified information. See ISCR Case No. 11-05365 at 3 (App. Bd. May 1, 2012).

The record evidence establishes two disqualifying conditions under this guideline: AG ¶ 19(a) ("inability or unwillingness to satisfy debts") and AG ¶ 19(c) ("a history of not meeting financial obligations"). The following mitigating conditions under this guideline are potentially applicable:

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.

Applicant's financial difficulties did not arise from conditions largely beyond his control, and he has not acted responsibly regarding the management of his finances. While he and his wife were earning more than \$10,000 a month, he failed to pay over

\$58,000 in taxes, defaulted on two mortgage loans and a home equity loan, and had more than \$8,200 in credit-card debt charged off. The credit-card debt was charged off at a time when Applicant was not paying his monthly mortgage or rent payment. There is no viable explanation for why he was so financially overextended, particularly given his representations of the actions he had taken to reduce his living expenses and the overtime pay and bonuses he and his wife received.

There is no record evidence that supports a conclusion that Applicant's finances are now under control. His credit-card debt was discharged in the Chapter 7 bankruptcy in May 2014. However, as of May 2016, he owes over \$7,300 in credit-card debt on which he pays only \$227 a month. He stopped paying his mortgage payments in 2012, which were about \$2,895, and continued to live in the house until at least May 2014. Yet, there is no record evidence that explains where the more than \$49,000 not paid for his mortgage was spent. He has more than \$1,400 a month in disposable income, yet he has less than \$2,500 in his combined checking and savings accounts. There is no record evidence that he maintains a budget.

While Applicant is repaying his taxes through installment plans and now files through a tax accountant, he did not reform his tax practices until he was forced to do so following an IRS audit. He made a determination that he had "learned" enough about tax laws that he could calculate his own taxes. He actively attempted to claim erroneous deductions in an effort to reduce the taxes he owed. The vast majority of the business-related expenses claimed by Applicant were disallowed by the IRS. Applicant did not merely make an arithmetic error or imprudently rely on bad advice. At best, he severely overestimated his ability to calculate his tax liabilities. At worst, he deliberately overestimated his permissible tax deductions. A common sense evaluation of Applicant's conduct, overall cavalier attitude towards resolving his debts combined with his lack of remorse for such egregious errors, gives me significant doubt about Applicant's judgment and reliability.

"Good faith" means acting in a way that shows reasonableness, prudence, honesty, and adherence to duty or obligation. ISCR Case No. 99-0201, 1999 WL 1442346 at *4 (App. Bd. Oct. 12, 1999.) "[A]n 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 this [mitigating condition.]" ISCR Case No. 03-20327 (App. Bd. Oct. 26, 2006). Applicant effectively used the legal remedy of bankruptcy as a method to strategically default on a mortgage loan and home equity line of credit for a house he could not or chose not to be able to afford, and to discharge his other delinquent debts.

Applicant's explanations for his financial hardship requests for a mortgage loan modification do not add up. His letters from August 2011 through May 2014 cited the factors contributing to his financial difficulties as business losses and expenses, loss of rental income, loss of overtime income, and the loss of his savings due to embezzlement. However, there is no record evidence that supports an actual loss of Applicant's income from his employment. The rental property lost approximately \$100 a month between 2005 and 2007, when it was foreclosed. However, Applicant missed several mortgage payments during that period, so his overall loss was likely

insignificant. While he was responsible for the deficiency balance of about \$30,000, he settled that debt for \$9,650 by April 2012. The \$2,295 claimed loss in rental income from Applicant's mother, who rented a room in Applicant's house, ended in 2010, well over a year before Applicant defaulted on his mortgage loan. The \$5,000 loss of savings due to embezzlement occurred in 2005, and Applicant sued and recouped about \$7,000 in damages.

Additionally, Applicant's testimony that none of his debts, excluding the mortgage loan and the line of credit, was delinquent at the time of the Chapter 7 bankruptcy filing was not accurate. Three of his accounts had been charged off prior to his submitting his e-QIP, and those delinquent debts were included in the bankruptcy. The inaccuracy of Applicant's statements demonstrates either a lack of veracity or a lack of attention to or understanding of his financial status.

Applicant's financial problems are recent and occurred under circumstances that cast doubt on his current reliability, trustworthiness, and good judgment. While Applicant completed the credit counseling required when he filed his 2013 and 2014 bankruptcies, there is no indication that he has altered his financial practices as a result of that counseling. Applicant has failed to meet his burden of production or persuasion. None of the mitigating conditions apply.

Whole-Person Concept

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. In applying the whole-person concept, an 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. An 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.

I have incorporated my comments under Guideline F in my whole-person analysis. Some of the factors in AG ¶ 2(a) were addressed under that guideline, but I have also considered the following:

Applicant has held a clearance since 2003 and his recent job performance evaluations have been positive. However, Applicant's repaying of his tax debts is the

result of his being audited, not the result of a good faith effort to resolve his debts. Because Applicant offered no plausible explanation for why he was unable to sustain his mortgage payments given his income, or what happened to all the money he did not spend on mortgage payments, I cannot conclude that Applicant's financial problems are under control or that they will not recur.

After weighing the disqualifying and mitigating conditions under Guideline F, and evaluating all the evidence in the context of the whole person, I conclude Applicant has not mitigated the security concerns raised by his delinquent debts. Accordingly, I conclude he has not carried his burden of showing that it is clearly consistent with the national interest to continue his eligibility for access to classified information.

Formal Findings

As required by section E3.1.25 of Enclosure 3 of the Directive, I make the following formal findings on the allegations in the SOR:

Paragraph 1, Guideline F (Financial Considerations): **AGAINST APPLICANT**

Subparagraphs 1.a – 1.e:

Against Applicant

Conclusion

I conclude that it is not clearly consistent with the national interest to continue Applicant's eligibility for a security clearance. Eligibility for access to classified information is denied.

Stephanie C. Hess
Administrative Judge