



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



In the matter of:)
)
) ISCR Case No. 15-02801
)
Applicant for Security Clearance)

Appearances

For Government: Daniel F. Crowley, Esq., Department Counsel
For Applicant: *Pro se*

03/24/2017

Decision

RIVERA, Juan J., Administrative Judge:

Applicant's financial problems resulted from a period of living beyond his financial means, a failed business, and not withholding sufficient income to pay taxes. He received a Chapter 7 Bankruptcy discharge in 2012. Since then, he has made lifestyle changes; paid, resolved, or established payment agreements for most of his delinquent debts, including his federal tax debt; and his credit report shows no new delinquent debt. He is in control of his financial situation and no longer lives beyond his financial means. Financial considerations security concerns are mitigated. Access to classified information is granted.

History of the Case

Applicant submitted a security clearance application (SCA) on November 24, 2013. After reviewing it and the information gathered during a background investigation, the Department of Defense (DOD) on October 26, 2015, issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guideline F (financial considerations).¹

¹ The DOD acted under Executive Order (EO) 10865, *Safeguarding Classified Information Within Industry* (February 20, 1960), as amended; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive) (January 2, 1992), as amended; and the *Adjudicative Guidelines for Determining Eligibility for Access to Classified Information* (AG), implemented by the DOD on September 1, 2006.

Applicant answered the SOR on November 5, 2015 (Answer), and requested a hearing before an administrative judge from the Defense Office of Hearings and Appeals (DOHA).

The case was assigned to me on April 13, 2016. DOHA issued a notice of hearing on May 4, 2016, scheduling the hearing for June 13, 2016. Applicant requested a postponement, and the second notice of hearing was issued on May 18, 2016, scheduling a hearing for June 21, 2016. The hearing was held as rescheduled. Government exhibits (GE) 1 through 5, and Applicant's exhibits (AE) 1 through 14, were admitted into evidence without objection. On June 28, 2016, DOHA received the transcript of the hearing.

Findings of Fact

In Applicant's response, he denied the allegation in SOR ¶ 1.a and submitted documentary evidence showing that he paid the state tax lien in June 2014. He generally admitted the remaining SOR allegations and provided extenuating and mitigating information. Applicant's admissions in his answer to the SOR and at the hearing are incorporated into my findings of fact.

Applicant is 48 years old. He completed a bachelor's degree in management information systems in 2002, and has worked in the information technology (IT) field for the last 26 years. Applicant married his wife in 1991 and they have three children, ages 19, 16, and 11.

Applicant worked for another federal agency between 1991 and 1993, and was granted the equivalent of a secret clearance. Between 2002 and 2010, he worked for two federal contractors and was granted a clearance in 2003, which has been continued to present, sometimes at the top-secret level. His current employer, a federal contractor, hired applicant in 2011.

Applicant submitted his most recent SCA in 2013. In response to Section 26 (Financial Record) of the SCA, Applicant disclosed that he had financial problems, which included a Chapter 7 bankruptcy discharge in 2012, and owing federal and state taxes. Applicant did not withhold sufficient money from his income to pay taxes, and he took early withdrawals from his retirement and children's education accounts for which he incurred taxes and penalties.

Applicant's wife is a schoolteacher. Between 2000 and 2008, she stopped working and stayed home to take care of their children. In 2008, she returned to work because of Applicant's financial problems. Applicant candidly testified that between 2000 and 2010, he did not manage his budget well and lived beyond his financial means. He had insufficient withholdings from his salary to pay his taxes because he needed the money to pay his bills and living expenses.

In 2008, Applicant withdrew money from his savings, retirement accounts, and children's education plans to stand up his own business. In 2010, he quit his job to dedicate himself to his business. Within six months of starting his business, Applicant realized his business was not making sufficient income to be successful. Because of his

accumulated debts, his attorney advised him to file for Chapter 7 bankruptcy protection in 2011.

Applicant's security investigation addressed his financial problems and revealed the federal and state tax liens and the bankruptcy filing. Applicant's history of financial problems is documented in his credit reports, his SOR response, and his testimony.

Concerning his 2012 bankruptcy, Applicant testified that he reaffirmed some of the bankruptcy debts, including a car loan and his two mortgage loans. He noted that he paid off the car loan and later sold it. The bank modified the first and second mortgage loans because of his past good payment history. He is current on his mortgage payments and continues to live in the same house to present.

Applicant acknowledged his tax problems were due to his negligence. He failed to withhold sufficient money from his income to pay his taxes, and he failed to calculate the taxes and penalties he would have to pay for the early withdrawal of retirement and his children's education plans funds. Applicant withdrew the funds in 2008, and that same year he immediately started a payment arrangement with the IRS, which continues to present. Since 2008, Applicant has paid \$14,700 to the IRS. As of May 2016, Applicant owes \$9,835 for tax year 2008; \$14,648 for tax year 2009; and \$6,447 for tax year 2011. (AE A, TAB 8)

Applicant's documentary evidence shows he currently has a good credit rating and no delinquencies. His budget, financial information, and credit reports show that he is not living beyond his financial means. He has a strong financial footing with only one student loan for his daughter. His financial history indicates that over the last 20 years Applicant paid 25 accounts (never late on this payments), and he had seven accounts discharged via the 2012 bankruptcy. He needs his clearance and current job to continue paying his debts and supporting his family. Taking care of his family is his priority.

At his hearing, Applicant expressed sincere remorse for his financial problems. He acknowledged his bad financial decisions. He believes that his failed business was a circumstance beyond his control that heavily contributed or exacerbated his financial problems. He testified that his financial situation is now stable and that he is motivated to resolve his financial problems. He is keeping his own budget and managing his expenses. He disclosed to his employer his financial problems and the SOR. Applicant believes he has learned his lesson and promised to maintain his financial responsibility.

Applicant is considered to be a highly professional, ethical, trustworthy, and responsible employee. He is judicious and careful handling and protecting sensitive information and following security rules and regulations. Applicant understands that he is required to maintain his financial responsibility to be eligible for a clearance.

Policies

Eligibility for access to classified information may be granted "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. The U.S. Supreme Court has recognized the substantial discretion of the Executive Branch in regulating access to information pertaining to national security, emphasizing that “no one has a ‘right’ to a security clearance.” *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988).

The AG list disqualifying and mitigating conditions for evaluating a person’s suitability for access to classified information. Any one disqualifying or mitigating condition is not, by itself, conclusive. However, the AG should be followed where a case can be measured against them, as they represent policy guidance governing access to classified information. Each decision must reflect a fair, impartial, and commonsense consideration of the whole person and the factors listed in AG ¶ 2(a). All available, reliable information about the person, past and present, favorable and unfavorable, must be considered.

Security clearance decisions resolve whether it is clearly consistent with the national interest to grant or continue an applicant’s security clearance. The Government must prove, by substantial evidence, controverted facts alleged in the SOR. If it does, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. The applicant bears the heavy burden of demonstrating that it is clearly consistent with the national interest to grant or continue his or her security clearance.

Persons with access to classified information enter into a fiduciary relationship with the Government based on trust and confidence. Thus, the Government has a compelling interest in ensuring each applicant possesses the requisite judgment, reliability, and trustworthiness of those who must protect national interest as their own. The “clearly consistent with the national interest” standard compels resolution of any reasonable doubt about an applicant’s suitability for access in favor of the Government. “[S]ecurity clearance determinations should err, if they must, on the side of denials.” *Egan*, 484 U.S. at 531; AG ¶ 2(b). Clearance decisions are not a determination of the loyalty of the applicant concerned. They are merely an indication that the applicant has or has not met the strict guidelines the Government has established for issuing a clearance.

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.

Applicant’s history of financial problems is documented in his credit reports, his SOR response, his testimony, and the record evidence. Applicant acknowledged he was

living beyond his financial means between 2000 and 2010. Applicant used his credit cards to pay for his extravagant lifestyle. Additionally, he failed to withhold income to pay for his taxes and compounded his financial problems by withdrawing money from his retirement and children school accounts to stand up his business. His business failed within a year.

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;” “(c) a history of not meeting financial obligations” and “(e) consistent spending beyond one’s means.” The record established the disqualifying conditions in AG ¶¶ 19(a), 19(c), and 19(e), 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;² 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.

² 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) 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)).

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

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).

There is no evidence to show Applicant had financial problems before 2000. His wife stopped working as a schoolteacher to take care of the children between 2000 and 2008. She resumed working as a school teacher in 2008 to help Applicant pay the debts.

Applicant acknowledged his financial problems resulted from his negligence. Although he filed for bankruptcy protection, he reaffirmed some of his debts and successfully paid some of them off, including a car note. He also modified his home mortgages and is current on his payments. Applicant paid the state tax lien alleged in SOR ¶ 1.a in 2014.

Concerning the IRS tax debts and liens, Applicant's documentary evidence show he timely filed his income tax returns. He failed to pay his taxes in full in 2008 (and other following years), because he did not have the money. Notwithstanding, Applicant immediately established payment arrangements with the IRS (the same year the debt was accrued) and has been consistently repaying his back taxes. Since 2008, he has paid \$14,648 in back taxes.

Applicant is currently in control of his own finances. The credit reports show that he has a good credit rating and has not acquired any new delinquent debt. His budget, financial information, and credit reports show that he is not living beyond his financial means. He has a strong financial footing with only one student loan for his daughter.

At his hearing, Applicant expressed sincere remorse for his financial problems. He acknowledged his bad financial decisions. He believes that his failed business was a circumstance beyond his control that heavily contributed or exacerbated his financial problems. His financial situation is now stable and he is motivated to continue resolving his financial problems. He is keeping his own budget and managing his expenses. He disclosed to his employer his financial problems and the SOR. Applicant believes he has learned his lesson and promised to maintain his financial responsibility.

Considering the evidence as a whole, Applicant's past financial problems do not cast doubt on his current reliability, trustworthiness, or good judgment. Applicant's efforts are sufficient to mitigate the financial considerations security concerns. I find there are clear indications that his financial problem is being resolved and is under control.

Whole-Person Concept

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case, and under the whole-person concept. AG ¶ 2(c). I have incorporated my comments under Guideline F in my whole-person analysis, but some warrant additional comment.

Applicant is 48 years old. He has worked for a federal agency and federal contractors (on-and-off) since 1991, sometimes holding access to classified information. He should have been more diligent managing his finances and withholding income to pay his taxes. Notwithstanding, under the totality of the circumstance of this case, Applicant's evidence is sufficient to establish his current financial responsibility. He showed good-faith efforts to resolve his tax debt. He is in control of his financial situation. Applicant understands that he has to maintain financial responsibility to be eligible for a clearance and retain his job. Financial considerations concerns are mitigated.

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:	FOR APPLICANT
Subparagraphs 1.a - 1.d:	For Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is clearly consistent with the national interest to grant or continue Applicant's eligibility for a security clearance. Eligibility for access to classified information is granted.

JUAN J. RIVERA
Administrative Judge