



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



In the matter of:

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ISCR Case No. 15-03435

Applicant for Security Clearance

Appearances

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

08/02/2016

Decision

HARVEY, Mark, Administrative Judge:

The statement of reasons (SOR) alleges nine delinquent debts totaling \$25,801, including a \$10,000 federal income tax debt. In 2009, Applicant failed to withhold sufficient funds for his federal income taxes, and he currently owes about \$8,000 to the Internal Revenue Service (IRS). He has made some progress paying his delinquent debts. 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 September 2, 2014, Applicant completed and signed a Questionnaire for National Security Positions (e-QIP) (SF 86). (Government Exhibit (GE) 1) On December 2, 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 under the Directive 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 21, 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 13, 2016. (HE 1) The hearing was held as scheduled.

During the hearing, Department Counsel offered five exhibits into evidence. (Tr. 16-17; Government Exhibit (GE) 1-5) Applicant objected to the accuracy and staleness of the credit reports. (Tr. 17-18) I overruled Applicant's objection, but noted I will give less weight to information in credit reports that he disputes. (Tr. 17-18) Applicant offered 11 exhibits, which were admitted without objection. (Tr. 19-24, 38-42; Applicant Exhibit (AE) A-K) The transcript was received on July 23, 2016.

Findings of Fact

In Applicant's SOR response, he admitted the SOR allegations in ¶¶ 1.b through 1.e and 1.g through 1.i. Applicant denied the allegations in SOR ¶¶ 1.a and 1.f. He also provided extenuating and mitigating information. Applicant's admissions are accepted as findings of fact.

Applicant is a 67-year-old technician employed by a defense contractor, who is seeking to continue his security clearance, which he has held for more than 20 years without a security violation. (Tr. 6, 26, 33, 57) In 1967, he graduated from high school. (Tr. 6) In 1971, he received an associate's degree. (Tr. 6-7) He served on active duty in the Army from 1972 to 1978. (Tr. 7) When he left the Army he was a sergeant (E-5). (Tr. 7) He received an honorable discharge. (AE G; AE H; GE 1) In 1981, he married, and in 1986, he divorced. (Tr. 8) In 1988, he married his spouse. (Tr. 8; GE 1) His child is 26 years old, and his stepchild is 39 years old. (Tr. 8; GE 1)

Financial Considerations

Applicant's employer moved operations to a different state. (Tr. 25) In 2007, Applicant was unemployed for one month. (Tr. 30) He moved to a different company, and his annual salary was reduced from \$78,000 to \$58,000. (Tr. 25, 31) In 2006 or 2007, his spouse received knee surgery; she could not work; and his household income was further reduced by the loss of her \$35,000 annual salary. (Tr. 30-32) He maintained his mortgage and most debts in current status; however, some debts became delinquent. (Tr. 25) His home decreased in market value. (Tr. 33)

Applicant's current annual salary is \$68,000. (Tr. 31) Applicant began receiving \$2,230 monthly Social Security retirement payments one month ago, and he began receiving \$2,100 monthly retirement payments from a previous employer a year ago. (Tr. 29, 34-35) He received financial counseling in 2009 or 2010. (Tr. 35) He intends to resolve his remaining debts in the near future, and he wishes to continue his current

employment. (Tr. 26, 54) He intends to retire in two years, and he wants to have all accounts in current status. (Tr. 54) He has about \$140,000 equity in his house and about \$2,000 in the bank. (Tr. 55-56)

Applicant's history of financial problems is documented in his credit reports, September 2, 2014 SCA, October 2, 2014 Office of Personnel Management (OPM) personal subject interview (PSI), SOR response, and hearing record. The SOR alleges nine delinquent debts totaling \$25,801, and their current status is as follows:

SOR ¶ 1.a is a bank debt placed for collection for \$3,454. Applicant said it was paid in 2011. (Tr. 27; SOR response) Applicant's February 16, 2016 Equifax credit report shows: the account became delinquent in 2011; the balance is \$3,454; the past-due amount is \$3,103; and it was charged off in February 2016. (GE 4 at 2) Applicant acknowledged that he had several accounts with this creditor, and he paid off one account. (Tr. 28) When he called the creditor in May 2016, the creditor said the account was charged off, and the creditor did not elaborate further about the debt. (Tr. 28-29)

SOR ¶¶ 1.b and 1.c are two bank debts from the same creditor for the same amount, \$1,547, that were placed for collection. Applicant said they were duplications of each other. (Tr. 36-37; SOR response) The balance owed is \$2,915. Applicant made \$200 monthly statements for seven months from January through July 2016. (Tr. 38-39; AE J)

SOR ¶ 1.d is a bank debt placed for collection for \$2,744. Applicant made three \$120 payments in 2016 to the creditor. (Tr. 40-42; AE K)

SOR ¶ 1.e is a bank debt placed for collection for \$2,040. Applicant planned to pay the creditor \$1,200 on August 1, 2016, in full settlement of the debt. (Tr. 43)

SOR ¶ 1.f is a pest control company debt placed for collection for \$1,547. Applicant believes the debt is actually about \$354, and it is paid in full. (Tr. 44) He provided a January 2016 check for \$155 and an April 2016 check for \$112 made payable to the creditor. (AE E)

SOR ¶ 1.g is a bank debt placed for collection for \$429. Applicant provided cancelled checks showing the account was paid and resolved in December 2015. (Tr. 45-46; AE D)

SOR ¶ 1.h is a debt placed for collection for \$2,493. In 2016, Applicant made about four \$125 payments to the creditor. (Tr. 46-47; AE B)

SOR ¶ 1.i is a federal tax lien filed in 2009 for \$10,000. Applicant miscalculated his income resulting in a federal tax debt. (Tr. 47, 57) In his September 2, 2014 SCA, Applicant said he had a \$175 monthly installment payment plan with the IRS. (GE 1) At his hearing, he said he made payments for at least one year. (Tr. 48) Applicant withheld insufficient funds from his income for his federal income taxes for tax years 2011 and 2013, and he owed about \$1,500 for each year. (Tr. 48, 58-59) He also under withheld

for 2015, and he owes the federal government several hundred dollars in federal income taxes for 2015. (Tr. 59) On May 29, 2015, the IRS wrote Applicant that his taxes owed for tax years 2011 and 2013 were included in his \$175 monthly installment plan. (SOR response) He provided checks showing from November 2015 through June 5, 2016, he made seven \$175 payments to the IRS under his payment plan. (AE C) His total current federal tax debt is about \$8,000. (Tr. 48-49) He also owes a much lesser amount to the state for income taxes. (Tr. 58-59)¹

Character Evidence

Applicant provided a July 1987 letter from the White House thanking him for sending words of support and encouragement to President Reagan. (AE F) Applicant was designated a drill sergeant in July 1971. (AE I)

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

¹Applicant’s SOR does not allege that he failed to pay his federal income taxes as required for tax years 2011, 2013, and 2015, and his state income taxes in full as required for several years. In ISCR Case No. 03-20327 at 4 (App. Bd. Oct. 26, 2006), the Appeal Board listed five circumstances in which conduct not alleged in an SOR may be considered stating:

- (a) to assess an applicant’s credibility; (b) to evaluate an applicant’s evidence of extenuation, mitigation, or changed circumstances; (c) to consider whether an applicant has demonstrated successful rehabilitation; (d) to decide whether a particular provision of the Adjudicative Guidelines is applicable; or (e) to provide evidence for whole person analysis under Directive Section 6.3.

Id. (citing ISCR Case No. 02-07218 at 3 (App. Bd. Mar. 15, 2004); ISCR Case No. 00-0633 at 3 (App. Bd. Oct. 24, 2003)). See also ISCR Case No. 12-09719 at 3 (App. Bd. April 6, 2016) (citing ISCR Case No. 14-00151 at 3, n. 1 (App. Bd. Sept. 12, 2014); ISCR Case No. 03-20327 at 4 (App. Bd. Oct. 26, 2006)). Consideration that Applicant failed to fully pay his federal income taxes for tax years 2011, 2013, and 2015, and to fully pay his state income taxes for several years when due will not be considered except for the five purposes listed above.

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 credit reports, SCA, SOR response, and hearing record. The SOR alleges nine delinquent debts totaling \$25,801, including a \$10,000 federal income tax debt. Around 2008, Applicant failed to withhold sufficient funds for his federal income taxes (which resulted in a \$10,000 federal tax lien in 2009), and he currently owes about \$8,000 to the IRS. 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;² and

²The 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)).

(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:

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).

AG ¶¶ 20(a) through 20(d) apply to the non-tax delinquent debts in SOR ¶¶ 1.b through 1.d, and 1.f through 1.h. These debts are either paid or in a payment plan. He received financial counseling. He assured he intends to pay the unresolved debts. Applicant made good progress bringing his non-tax delinquent debts to current or paid status.

Three circumstances beyond his control adversely affected his finances. Applicant's employer moved operations to a different state. In 2007, Applicant was unemployed for one month. He moved to a different company, and his annual salary was reduced from \$78,000 to \$58,000. In 2006 or 2007, his spouse received knee surgery; she could not work; and his household income was further reduced by the loss of her \$35,000 annual salary. His home decreased in market value.

Applicant's failure to timely pay his taxes in full raises the most significant security concern. Around 2008 and for tax years 2011, 2013, and 2015, he failed to pay his federal income taxes in full when due. He has had a tax debt ranging from \$10,000 to the current \$8,000 from 2009 to the present. He also owes an unspecified amount of state income taxes. He has a payment plan to resolve his \$8,000 federal tax debt. Applicant is receiving two pensions in addition to his salary. He did not explain why he did not make more progress resolving his tax debts. 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 67-year-old technician employed by a defense contractor, who is seeking a security clearance. In 1971, he received an associate's degree. He served on active duty in the Army from 1972 to 1978. Applicant was designated a drill sergeant. When he left the Army he was a sergeant, and he received an honorable discharge. A July 1987 letter from the White House thanked Applicant for sending words of support and encouragement to President Reagan.

Reduction in Applicant's income through changes in employment, loss of his spouse's employment because of knee surgery, and decrease in his home value were all circumstances beyond his control that adversely affected his finances.

In 2009, Applicant failed to withhold sufficient funds for his federal income taxes, and he currently owes about \$8,000 to the IRS. He either paid or is making payments to address six of the nine SOR debts. Three debts remain unresolved totaling about \$12,000 including an \$8,000 IRS debt.

Applicant failed to fully pay his federal income taxes around 2008 and for tax years 2011, 2013, and 2015 when due. He owes an unspecified amount of state income taxes. He has been making payments on his delinquent taxes since at least September 2014. However, his history of failing to fully pay his federal and state income taxes when due raises unresolved financial considerations security concerns. He owes about \$8,000 to the IRS.³ 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,

³See 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.").

whether the IRS generates the tax returns, and how long the applicant waits after a tax debt arises to begin and complete making payments.⁴ There is no evidence Applicant failed to timely file his tax returns; however, the primary problem here is that Applicant has owed about \$8,000 to \$10,000 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.

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
Subparagraph 1.a:	Against Applicant
Subparagraphs 1.b through 1.d:	For Applicant
Subparagraph 1.e:	Against Applicant
Subparagraphs 1.f through 1.h:	For Applicant
Subparagraph 1.i:	Against Applicant

⁴See 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 "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).

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