



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



In the matter of:)	
)	
REDACTED)	ISCR Case No. 15-03797
)	
Applicant for Security Clearance)	

Appearances

For Government: Carroll J. Connelly, Esq., Department Counsel
For Applicant: *Pro se*

01/19/2017

Decision

MENDEZ, Francisco, Administrative Judge:

Applicant mitigated security concerns raised by his past financial problems. In 2011, he took decisive and responsible action to resolve his financial situation by filing for Chapter 13 bankruptcy. He demonstrated financial rehabilitation by repaying his debts through a confirmed, 60-month Chapter 13 plan. Clearance is granted.

Statement of the Case

On December 8, 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 Applicant answered the SOR and requested a determination based on the administrative (written) record.

On February 24, 2016, Department Counsel prepared a file of relevant material (FORM) and sent it to Applicant. With the FORM, Department Counsel forwarded to

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.

Applicant seven exhibits that the Government offers for admission into the administrative record, including a summary of Applicants security clearance interview (clearance interview) and Chapter 13 bankruptcy records. These exhibits are admitted into the administrative record without objection.²

Applicant received the FORM on March 8, 2016, and was given 30 days to submit a response, including evidence in mitigation and extenuation. He did not submit a response. On December 6, 2016, I was assigned the case for decision. After confirming Applicant's continuing sponsorship for a clearance and recognizing the considerable amount of time and expense already expended, I reopened the record to provide Applicant a final opportunity to submit a response. He timely submitted bankruptcy court documents showing that he repaid his debts, including those alleged in the SOR, over a period of 60 months and successfully completed a confirmed Chapter 13 plan. This document was marked Exhibit A and admitted into the administrative record without objection. See Appellate Exhibits (App. Exh.) I – III.

On January 4, 2017, after reviewing the record evidence and Department Counsel's stated position,³ I advised the parties that the matter appeared appropriate for summary disposition. Department Counsel promptly objected to the resolution of the case in this fashion and requested a full decision. See App. Exh. IV.

Findings of Fact

Applicant, who is in his late fifties, is married (second time) and has five adult children. He and his current wife have been foster parents to children placed with them by a local state agency. As of June 2013, they were in the process of adopting four children between 4 and 7 years old (the youngest two are twin siblings), who were initially placed with them by the foster care agency.

In 2005, Applicant and his former spouse divorced after 25 years of marriage. She was awarded alimony and he was left responsible for the majority of the marital debt, including the family home. The following year, he refinanced the home, moved

² Applicant was advised he could raise an objection to the exhibits offered by the Government, including the clearance interview. See FORM, n.1; App. Exh. III. He did not raise an objection. Therefore, I admitted the exhibits and gave them the appropriate weight. ISCR Case No. 14-06781 (App. Bd. Dec. 16, 2016) (failure to raise objection to exhibits offered by the Government with the FORM waives any potential objection); ISCR Case No. 15-05252 (App. Bd. Apr. 13, 2016) (judge erred in *sua sponte* excluding clearance interview); ISCR Case No. 95-0817, 1997 WL 377207 (App. Bd. Feb. 21, 1997) (same). See also ISCR Case No. 14-06011 (App. Bd. Dec. 9, 2015) ("The weight that a Judge assigns to evidence is a matter within his or her discretion. Mere disagreement with a Judge's weighing of the evidence is not sufficient to demonstrate the Judge weighed the evidence in a manner that was arbitrary, capricious, or contrary to law."); ISCR Case No 03-21434 at 5 (App. Bd. Feb. 20, 2007) ("the DOHA process encourages Judges to err on the side of initially admitting evidence into the record, and then to consider . . . what, if any, weight to give to that evidence.")

³ Of note, Department Counsel argued, *inter alia*, that Applicant failed to establish it was clearly consistent with the national interest to grant his request for a security clearance, because he had yet to submit documentary evidence showing he "acted responsibly and in good-faith to begin to repay his financial obligations." See FORM at 3.

out, and rented the home to pay the mortgage. After a year or two, the renters stopped paying the rent and Applicant was eventually unable to pay the mortgage. He attempted to sell the property without success. The state where the home is located was severely impacted by the recent economic recession. Applicant was able to get the lender to agree to a short sale in 2011, but he remained liable for the \$35,000 deficiency balance. The mortgage-related deficiency balance is referenced in SOR 1.e.

In 2009, Applicant retired from Company A, a large telecommunications company for which he had held different managerial positions from 1995 to 2009. He received a large payout upon retiring, but with increased expenses tied to the loss of the rental income, his finances were stretched thin. Sometime the following year, Applicant received a notice from the IRS informing him that they had not received his 2009 tax return and assessing him about \$7,500 in overdue taxes. Applicant explained during his clearance interview that he had filed his 2009 tax return electronically, but for an unknown reason it had not been received by the IRS. He also explained that he had not deducted a sufficient amount in income taxes from the lump sum amount he received upon retiring, which resulted in higher than expected taxes owed for tax years 2009 and 2010. He returned to the workforce, and was hired by his current employer in July 2010. He negotiated an installment agreement with the IRS to pay his overdue income taxes. He reduced his federal tax debt to \$7,000 before filing for Chapter 13 bankruptcy. His state tax debt was reduced to a lien secured by his current residence. The 2009 and 2010 federal and state tax debts are referenced in SOR 1.b – 1.d.

In 2010, shortly before returning to the workforce, Applicant's already tenuous financial situation suffered another blow when his wife decided to become a stay-at-home parent to better care for the children placed with them by the foster care agency. Even after securing his current job, Applicant was unable to pay his debts and accrued a large sum of delinquent debt. In July 2011, he filed a Chapter 13 bankruptcy petition, explaining during his clearance interview that he did not want to file for Chapter 7, because he felt an obligation to repay his debts.⁴

In 2013, Applicant submitted a security clearance application and listed the Chapter 13. During a follow-up clearance interview, he discussed in detail his financial situation. He stated that he was repaying his debts, including the overdue taxes and the deficiency balance for his former home, through a confirmed Chapter 13 plan. He was making the plan payments through automatic deduction from his wages.⁵ Applicant's Chapter 13 petition reflects that after paying his monthly expenses, his monthly net disposable income was approximately \$590, which the bankruptcy court ordered him to pay on a monthly basis to the bankruptcy trustee. The monthly bankruptcy payments became Applicant's third highest monthly expense after his mortgage and food, and slightly higher than his alimony (maintenance) payments to his former spouse.

Applicant submitted documentary proof, Exhibit A, that he successfully completed the 60-month Chapter 13 plan by paying over \$33,000 to the bankruptcy

⁴ Exhibit 3 at 4.

⁵ Exhibit 3; Exhibit 7, bankruptcy petition, at 26 (federal tax debt), 29 (deficiency balance).

trustee. Overdue taxes are generally considered priority debts that a Chapter 13 debtor must fully repay. In addition to making the required debt repayments, a Chapter 13 debtor is required, by law, to complete a course of financial management and “must provide the Chapter 13 case trustee with a copy of the tax return or transcripts for the most recent tax year as well as tax returns filed during the case (including tax returns for prior years that had not been filed when the case began).”⁶ The Chapter 13 is referenced in SOR 1.a.

Applicant now uses a budget to track and manage his finances. He has not incurred other delinquent debt since filing for bankruptcy over five years ago.

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 ¶ E3.1.15.⁷

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

⁶ Chapter 13 – Bankruptcy Basics at 2-3 (citing to, 11 U.S.C. § 521), a publication of the U.S. Federal Courts, available at uscourts.gov/services-forms/bankruptcy/bankruptcy-basics/chapter-13-bankruptcy-basics and attached to and made a part of the administrative record as App. Exh. V.

⁷ See also ISCR Case No. 15-01208 at 4 (App. Bd. Aug. 26, 2016); ISCR Case No. 11-00391 (App. Bd. Dec. 1, 2011).

“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 a person 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 a person's delinquent debts cast doubt upon their judgment, self-control, and other qualities essential to protecting classified information.⁸

Applicant's past financial problems raise the financial considerations security concern and the disqualifying condition listed at AG ¶¶ 19(c) and 19(g). Applicant bears a heavy burden in mitigating the heightened security concerns raised by his failure to timely file and pay his taxes. Guideline F lists a number of conditions that could mitigate the concern, including the following:

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

⁸ ISCR Case No. 11-05365 at 3 (App. Bd. May. 1, 2012).

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 past financial problems were, in part, attributable to matters beyond his control, including the economic downturn,⁹ divorce, loss of rental income, and apparent electronic mishap that resulted in the loss of his tax filings. With the benefit of hindsight, his decision to retire early (presumably a voluntary decision) and not set aside a sufficient amount to pay the taxes owed on the lump sum payment were matters within his control that exacerbated his already fragile financial situation. Setting aside the cause or causes of Applicant's past financial issues, he took decisive and responsible action to resolve his financial situation in 2011. He first resolved the delinquent mortgage involving his former home through a short sale and then filed for Chapter 13 to repay his other debts.¹⁰ He presented clear, concise, and unambiguous evidence showing a track record of debt repayment over the course of the past five years. AG ¶¶ 20(a) through 20(d) apply.

The responsible steps Applicant took in 2011 to address his financial problems, which was two years before he applied for a security clearance and four years before the SOR was issued, are especially relevant in the security clearance context. The Appeal Board has stated, in addressing a different adjudicative guideline, that:

A clearance adjudication is an applicant's opportunity to demonstrate that, prior to being awarded a clearance, he actually possesses the judgment, reliability, and trustworthiness essential to a fiduciary relationship with this country.¹¹

Applicant met his heavy burden of persuasion and mitigated the security concerns raised by his financial circumstances. Furthermore, Applicant affirmatively established by the manner in which he responsibly dealt with his past financial problems that he holds the requisite judgment, reliability, and other essential character traits required of clearance holders. Overall, the record evidence leaves me with no questions or doubts about Applicant's present eligibility for access to classified information.¹²

⁹ ISCR Case No. 14-02394, n.1 (App. Bd. Aug. 17, 2015) (noting that federal courts have taken judicial notice of the 2008-2009 recession).

¹⁰ *Contrast with* ISCR Case No. 10-01978 (App. Bd. Aug. 24, 2011) (after getting into financial trouble, applicant simply walked away from his financial obligations).

¹¹ ISCR Case No. 10-09986 at 3 (App. Bd. Dec. 15, 2011).

¹² In reaching this favorable conclusion, I considered the whole-person factors in AG ¶ 2(a).

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.e:	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 access to classified information. Applicant's request for a security clearance is granted.

Francisco Mendez
Administrative Judge