



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



In the matter of:

[NAME REDACTED]

Applicant for Security Clearance

ISCR Case No. 15-04282

Appearances

For Government: Chris Morin, Esq., Department Counsel
For Applicant: *Pro Se*

12/05/2016

Decision

MALONE, Matthew E., Administrative Judge:

Applicant did not file or pay his federal and state income taxes as required for the tax years 2007 through 2012. In 2013, he filed all of his past-due returns and has filed his returns as required since then. He entered into federal and state repayment plans in 2014. The state debt is nearly satisfied. Applicant also incurred significant delinquent or past-due commercial debt after he and his wife separated in 2015. His recent decision to file for Chapter 13 bankruptcy protection was prudent under the circumstances. Applicant's request for a security clearance is granted.

Statement of the Case

On October 14, 2014, Applicant submitted an Electronic Questionnaire for Investigations Processing (EQIP) to obtain or renew a security clearance required for his employment with a defense contractor. Based on the results of the ensuing background investigation, Department of Defense (DOD) adjudicators could not determine that it is clearly consistent with the national interest for Applicant to have a security clearance.¹

¹ Required by Executive Order 10865, as amended, and by DOD Directive 5220.6 (Directive), as amended.

On December 10, 2015, DOD issued a Statement of Reasons (SOR) alleging facts which raise security concerns addressed under the adjudicative guideline² for financial considerations (Guideline F). Applicant timely responded to the SOR (Answer) and requested a hearing.³ The case was assigned me on May 18, 2016, and I convened a hearing on June 29, 2016. The parties appeared as scheduled. Department Counsel presented Government Exhibits (Gx.) 1 - 3.⁴ Applicant testified in his own behalf and submitted Applicant's Exhibits (Ax.) A - C. All exhibits were admitted without objection. I left the record open after the hearing to receive additional relevant information. The record closed on July 7, 2016, when I admitted, without objection, Applicant's post-hearing submissions as Ax. D - G.⁵ A transcript of the hearing (Tr.) was received on July 13, 2016.

Findings of Fact

Under Guideline F, the Government alleged that Applicant owed \$67,433 for unpaid federal taxes being enforced through a 2014 tax lien (SOR 1.a) and \$8,500 for unpaid state taxes in tax years 2007 through 2012 (SOR 1.b). It was also alleged that Applicant had not filed federal and state returns, or paid his federal and state taxes for tax years 2007 through 2012 (SOR 1.c). The SOR also presented allegations that Applicant owes another \$19,636 for seven delinquent or past-due commercial debts (SOR 1.d - 1.j). In response, Applicant denied SOR 1.h and took issue with the amount of debt actually owed. He admitted the remaining SOR allegations. In addition to the facts thus established, I make the following findings of fact.

Applicant is 52 years old and works for a defense contractor in a position for which he was first hired in February 2007. He previously worked in similar positions for two different contractors between April 2004 and February 2007. He has held a security clearance since at least 2005. In April 2004, Applicant retired from the United States Army after 20 years of honorable service. He married in February 1989 and has two children, ages 19 and 24. Applicant and his wife have been separated since February 2015. (Answer; Gx. 1; Tr. 5, 48, 58)

² The adjudicative guidelines were implemented by the Department of Defense on September 1, 2006. These guidelines were published in the Federal Register and codified through 32 C.F.R. § 154, Appendix H (2006).

³ In Applicant's initial SOR response, dated January 2, 2016, he asked for a decision without a hearing. However, on April 8, 2016, he asked that his case be converted to a hearing.

⁴ At Department Counsel's request, I have included, as Hearing Exhibit (Hx.) 1, a copy of the May 3, 2016 letter that forwarded Gx. 1 - 3 to Applicant, in accordance with Directive Section E3.1.13. Also included, as Hx. 2, is a list identifying those exhibits.

⁵ Department Counsel's email forwarding Ax. D - G and waiving objection thereto is included as Hx. 3. Ax. D consists of five letters from the IRS, all dated May 6, 2013, advising Applicant of his failure to file tax returns for 2007 through 2011. Ax. E consists of the front pages of federal income tax returns for 2007 through 2011. It also contains the second pages of federal income tax returns for 2012 - 2015. The front pages of the 2007 - 2009 returns are stamped as filed with the IRS between June and July 2013. The front pages of the returns for 2010 and 2011 are stamped as filed in October 2013. The 2012 second page reflects that the return for that tax year was filed in October 2013. The 2013 - 2015 second pages show they were filed in April of 2014 - 2016, respectively. Ax. F contains information (4 pages) pertaining to Applicant's claims of repayment agreements with state and federal tax authorities. Ax. G (two pages) consists of copies of six money orders proffered as proof of Chapter 13 bankruptcy payments. Three of the copies have the word "June" handwritten on them, but none are actually dated and no payee is noted on any of the receipts. However, the total amounts reflected in the receipts are equal to Applicant's monthly Chapter 13 payments.

All of Applicant's defense contractor work between April 2004 and November 2011 was performed overseas. For all intents and purposes, he lived and worked full time overseas while his family remained in the United States. Applicant would return periodically for either pre-planned two-week vacations or for a few months in between projects. Between April 2004 and February 2007, Applicant lived and worked in either Kuwait or Qatar. Between February 2007 and November 2011, Applicant lived and worked in Iraq. In Kuwait and Qatar, Applicant was able to manage his affairs relatively easily. However, his work in Iraq was done under more arduous and austere conditions, and he was unable to closely manage his affairs at home. (Gx. 1; Tr. 36, 49, 61)

When Applicant started working in Iraq, he gave his wife a power of attorney and left the handling of their finances and other personal matters to her. Among the functions she was to handle was the filing of their annual federal and state income tax returns. Applicant had been able to complete those tasks while he was in Qatar and Kuwait. But ongoing combat missions and relatively poor support conditions in Iraq made it impossible for him to tend to his taxes and other affairs. (Answer; Tr. 36, 50 - 54)

As alleged in the SOR, and as he disclosed in his 2014 EQIP, Applicant's federal and state income tax returns were not filed for tax years 2007 through 2012 when they were due. No extensions for any of those tax years were filed either. Applicant averred that his wife did not file his⁶ returns because she had received informal and inaccurate advice from a friend that Applicant did not have to file because he worked overseas. Although Applicant may receive some relief from his tax liability for income earned abroad, he always has been required to file annual federal and state returns. (Answer; Gx. 1; Tr. 53 - 54)

Applicant returned from Iraq in November 2011 and no longer works abroad. In May 2013, Applicant received notices from the IRS that his 2007 - 2011 returns had not been received. Applicant claimed he did not know until then that his returns had not been filed as required. He did not explain why he did not take back responsibility for his tax returns when he returned. Applicant did present information showing his federal returns for 2007 through 2012 were filed between June and October 2013; and that his federal returns for 2013 through 2015 have been timely filed as required. (Answer; Gx. 1; Ax. C - E; Tr. 23 - 25, 55 - 58)

As alleged in the SOR and disclosed in his EQIP, Applicant incurred delinquent federal and state tax debts totaling \$75,933. Starting in 2012, Applicant also accrued another \$19,633 in personal commercial debts. Applicant claimed those debts arose, in large part, when he and his wife separated and her income was removed from the household finances. In April 2016, Applicant filed for Chapter 13 bankruptcy protection. His petition addressed debts totaling \$216,100, and he is required to pay \$2,500 each month for five years. The mail order receipts in Ax. G appear to represent his first two Chapter 13 payments. (Answer; Gx. 1; Ax. A - C; Ax. G; Tr. 39 - 40, 42 - 46, 58 - 59)

In March and April 2014, Applicant entered into repayment agreements with both the IRS and his state's tax authority. Applicant pays the IRS \$200 each month to satisfy a \$67,000 tax lien against him. Initially, the state repayment plan he established in 2014 required him to pay \$175 each month, which was taken directly from his bank account. Now his state tax debt is included in his Chapter 13 repayment plan. Also, his

⁶ Available returns show Applicant and his wife usually filed separate returns, with his returns filed as "Head of Household," rather than "Married, Filing Jointly." (Ax. E)

bankruptcy attorney recently advised Applicant that, due to the passage of time, Applicant will have to pay only for his 2013 state taxes. As a result, his original \$8,500 state tax debt, already reduced through two years of monthly payments, is now \$753. (Answer; Gx. 1; Ax. B; Ax. F; Tr. 60)

Applicant testified that his finances are currently sound. After paying all of his regular obligations, including his payments to the IRS and the bankruptcy trustee, he claims to have about \$1,000 remaining each month. Other than completing the course in financial management that is a prerequisite for filing bankruptcy, Applicant has not engaged in any professional financial counseling or other assistance for his financial problems. (Tr. 40 - 47, 72 - 74)

Policies

Each security clearance decision must be a fair, impartial, and commonsense determination based on examination of all available relevant and material information,⁷ and consideration of the pertinent criteria and adjudication policy in the adjudicative guidelines (AG). Decisions must also reflect consideration of the factors listed in ¶ 2(a) of the guidelines. Commonly referred to as the “whole-person” concept, those factors are:

(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.

The presence or absence of a disqualifying or mitigating condition is not determinative of a conclusion for or against an applicant. However, specific applicable guidelines should be followed whenever a case can be measured against them as they represent policy guidance governing the grant or denial of access to classified information.

A security clearance decision is intended only to resolve whether it is clearly consistent with the national interest⁸ for an applicant to either receive or continue to have access to classified information. The Government bears the initial burden of producing admissible information on which it based the preliminary decision to deny or revoke a security clearance for an applicant. Additionally, the Government must be able to prove controverted facts alleged in the SOR. If the Government meets its burden, it then falls to the applicant to refute, extenuate or mitigate the Government's case. Because no one has a “right” to a security clearance, an applicant bears a heavy burden of persuasion.⁹ A person who has access to classified information enters 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

⁷ See Directive. 6.3.

⁸ See *Department of the Navy v. Egan*, 484 U.S. 518 (1988).

⁹ See *Egan*, 484 U.S. at 528, 531.

requisite judgment, reliability and trustworthiness of one who will protect the national interests as his or her 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.¹⁰

Analysis

Financial Considerations

The Government established its case through sufficient and reliable information that supports the SOR allegations under this guideline. The facts established by this record reasonably raise a security concern about Applicant’s finances that is addressed, in relevant part, at AG ¶ 18, as follows:

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.

More specifically, this record requires application of the disqualifying conditions at AG ¶¶ 19(a) (*inability or unwillingness to satisfy debts*); 19(c) (*a history of not meeting financial obligations*); and 19(g) (*failure to file annual Federal, state, or local income tax returns as required or the fraudulent filing of the same*).

I also have considered the following pertinent AG ¶ 20 mitigating conditions:

(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; and

(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.

As to Applicant’s failure to file or pay his taxes as required (SOR 1.a - 1.c), the mitigating conditions at AG ¶ 20(a) - 20(c) apply. Applicant began relying on his wife to file his returns in 2007, when he began working in Iraq and did not have access to the resources he needed to file his returns himself. There is no indication he did not file his returns as required before he went to Iraq. His reliance on his wife was reasonable under the circumstances, and it was not expected that she would decide not to file in his absence. But it was still incumbent on Applicant to at least monitor his taxes and other financial matters when he could. He was irresponsible in his lack of attention to his

¹⁰ See *Egan*; AG ¶ 2(b).

taxes, especially between his return in November 2011 and his receipt in May 2013 of IRS letters advising him of his past-due returns. Nonetheless, Applicant filed those returns within five months of receiving the IRS letters. Further, his returns have since been timely filed every year starting in April 2014 with the filing of his returns for tax year 2013. Also in 2014, Applicant established repayment plans with the IRS and his state's tax authority to repay the taxes he owed for the 2007 - 2012 tax years.

As to Applicant's other debts, alleged at SOR 1.d - 1.j, Applicant's October 2014 credit report reflects he was current on most of his obligations. But the November 2015 credit report documents the SOR debts as past-due or delinquent. This information tends to support Applicant's claim that these debts became past-due after he and his wife separated in May 2015 and her income was no longer available to meet the financial obligations left to Applicant. Under these circumstances, Applicant's Chapter 13 bankruptcy petition is a prudent step to take in resolving his financial problems. He is able to make payments and still have sufficient monthly cash flow to with which to avoid new unpaid debts. On balance, I conclude the foregoing is sufficient to mitigate the security concerns about Applicant's finances.

I also have evaluated this record in the context of the whole-person factors listed in AG ¶ 2(a). Applicant retired after a 20-year career in the Army. Although he neglected his responsibilities regarding his taxes for several years, his explanation for his conduct was plausible and he has since corrected his past-due tax obligations. He also has taken action to resolve more recent personal financial problems stemming from circumstances beyond his control. There is no indication that Applicant is living beyond his means, and his current tax situation and personal finances do not reflect adversely on his judgment. A fair and commonsense assessment of the record as a whole shows the security concerns raised by the Government's information are mitigated.

Formal Findings

Formal findings 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.j:	For Applicant

Conclusion

In light of all of the foregoing, it is clearly consistent with the national interest for Applicant to have access to classified information. Applicant's request for a security clearance is granted.

MATTHEW E. MALONE
Administrative Judge