



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



In the matter of:

Applicant for Security Clearance

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ISCR Case No. 15-04993

Appearances

For Government: Daniel F. Crowley, Esquire, Department Counsel

For Applicant: *Pro se*

04/10/2017

Decision

GALES, Robert Robinson, Administrative Judge:

Applicant failed to mitigate the security concerns regarding financial considerations. Eligibility for a security clearance and access to classified information is denied.

Statement of the Case

On August 29, 2014, Applicant applied for a security clearance and submitted an Electronic Questionnaire for Investigations Processing (e-QIP) version of a Security Clearance Application.¹ On August 21, 2015, the Department of Defense (DOD) Consolidated Adjudications Facility (CAF) issued an SOR to him, under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended and modified; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended and modified (Directive); and the *Adjudicative Guidelines for Determining Eligibility For Access to Classified Information* (December 29, 2005) (AG) applicable to all adjudications and other determinations made under the Directive, effective September 1, 2006. The SOR alleged security concerns

¹ Item 3 (e-QIP, dated August 29, 2014).

under Guideline F (Financial Considerations), and detailed reasons why the DOD adjudicators were unable to find that it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. The SOR recommended referral to an administrative judge to determine whether a clearance should be granted, continued, denied, or revoked.

It is unclear as to when Applicant received the SOR as there is no receipt in the case file. On March 11, 2016, he responded to the SOR and elected to have his case decided on the written record in lieu of a hearing.² A complete copy of the Government's file of relevant material (FORM) was mailed to Applicant by the Defense Office of Hearings and Appeals (DOHA) on May 2, 2016, and he was afforded an opportunity, within a period of 30 days after receipt of the FORM, to file objections and submit material in refutation, extenuation, or mitigation. In addition to the FORM, Applicant was furnished a copy of the Directive as well as the Guidelines applicable to his case. Applicant received the FORM on May 5, 2016. Applicant's response was due on June 4, 2016, and on an unspecified date before then, he submitted some documents to which there was no objection. The case was assigned to me on February 10, 2017.

Findings of Fact

In his Answer to the SOR, Applicant admitted all of the factual allegations pertaining to financial considerations (§§ 1.a. through 1.q.). Applicant's admissions and comments are incorporated herein as findings of fact. After a complete and thorough review of the evidence in the record, and upon due consideration of same, I make the following additional findings of fact:

Applicant is a 33-year-old employee of a defense contractor. He has been a cable installer with the company since July 2013, and before that, he was an installation supervisor for another employer from November 2007 until July 2013. Applicant was unemployed from May 2004 until August 2005. He is a high school graduate. He attended a university for approximately one school year in 2008-09, but did not receive a degree. He also attended a vocational college from 2010 until 2013, but did not receive a degree. He has never served in the U.S. military. It is unclear if he was ever granted a security clearance. Applicant was married in January 2009. He has no children.

² Applicant's Answer to the SOR was erroneously dated March 11, 2015. It should be noted that the affidavit form upon which Applicant was to choose either a hearing or a decision based upon the administrative record, and list his contact information, and which the notary public was to sign, was a boilerplate preprinted form with "2015" furnished to him. The correct date should be "2016."

Financial Considerations³

There was nothing unusual about Applicant's finances until about the end of 2008. Applicant was interviewed by an investigator from the U.S. Office of Personnel Management (OPM) in November 2014, and in that interview he acknowledged that during unspecified periods from November 2008 and November 2014, his wife had been "sporadically employed," and they had to prioritize their accounts. Things apparently became worse towards the end of 2010, when she lost her job, and the entire family financial responsibility became his. Applicant's resources were purportedly exhausted and accounts became delinquent. An automobile was voluntarily repossessed; student loans went into default; a rental property was foreclosed; and federal and state income tax returns were not timely filed. Applicant's financial difficulties were exacerbated by his driving habits because he repeatedly received tickets from various municipalities for parking, speeding, or red light violations. Applicant stated that his salary had increased and he intended to repay all of his debts.

In addition to the two allegations pertaining to the failure to timely file federal and state income tax returns, the SOR identified 15 delinquent debts that had been placed for collection or charged off, as generally reflected by the September 2014 credit report⁴ and the January 2016 credit report.⁵ Those debts, totaling \$10,775, their current status, according to the credit reports, other evidence submitted by the Government, and Applicant's comments regarding same, are described below.

(SOR ¶ 1.a.) refers to an automobile loan account with a high credit of \$15,489 that was \$7,977 past-due and for which \$8,031 was charged off in August 2012. In May 2016 – five months after the SOR was issued – Applicant and the collection agent agreed to a repayment plan under which Applicant established pre-authorized \$100 monthly payments, commencing on June 3, 2016.⁶ The account is in the process of being resolved.

(SOR ¶¶ 1.b. through 1.g.) refer to six student loan accounts with varying high credits (\$4,000, \$4,000, \$4,500, \$3,500, \$3,500, and \$2,625), unpaid balances (\$4,595, \$5,166, \$4,783, \$4,047, \$4,047, and \$3,036), and past-due balances (\$415, \$330, \$433, \$259, \$259, and \$194) that fell into a default status before Applicant was able to rehabilitate them.⁷ On January 20, 2015 – one year before the SOR was issued – Applicant and the U.S. Department of Education established a repayment plan under

³ General source information pertaining to the financial accounts discussed below can be found in the following exhibits: Item 3, *supra* note 1; Item 2 (Applicant's Answer to the SOR, dated March 11, 2015); Item 5 (Personal Subject Interview, dated November 20, 2014); Item 4 (Combined Experian, TransUnion, and Equifax Credit Report, dated September 10, 2014); Item 6 (Equifax Credit Report, dated January 11, 2016). More recent information can be found in the exhibits furnished and individually identified.

⁴ Item 4, *supra* note 3

⁵ Item 6, *supra* note 3.

⁶ Notice of Payment, dated May 27, 2016, attached to Applicant's Response to the FORM.

⁷ Item 4, *supra* note 3; Item 6, *supra* note 3; Letter, dated May 11, 2016, attached to Applicant's Response to the FORM.

which he has been making monthly payments of \$148.39, reducing the balance of \$29,359.54 to \$28,886.97.⁸ The accounts are in the process of being resolved.

(SOR ¶¶ 1.h. through 1.m., and 1.o.) refer to seven tickets from various municipalities over a multi-year period (2010 through 2014) for parking, speeding, or red light violations in the amounts of \$300, \$100, \$100, \$100, \$85, \$85, and \$55.⁹ On May 24, 2016 – five months after the SOR was issued – Applicant paid off all of the fines.¹⁰ The accounts have been resolved.

(SOR ¶ 1.n.) refers to a medical account with an unpaid balance of \$83.¹¹ Applicant claimed that the bill simply slipped past him, and he contended that he had “paid it about a year ago,”¹² also said to have occurred in August 2014,¹³ but he failed to submit any documentation, such as a cancelled check, receipt, credit card payment listing, etc., to support his contention that the bill had been paid. In the absence of such documentation, I conclude that the account remains unresolved.

(SOR ¶¶ 1.p. and 1.q.) refer to federal and state income tax returns for the tax years 2011, 2012, and 2013 that were allegedly not timely filed. In his e-QIP, Applicant, commented that “for my 2013 taxes, I filed an extension due to some documents that did not come in on time, and I believe my 2012 or [2011] have not been filed . . . and plan to get that resolved within this week.”¹⁴ In his Answer to the SOR, Applicant admitted that he had not timely filed his federal income tax return for 2011 or his state income tax return for 2013, and indicated that both returns were “recently sent off.”¹⁵ Applicant’s federal income tax return for 2011 was received by the Internal Revenue Service (IRS) on February 23, 2016, nearly four years late.¹⁶ His federal income tax return for 2012 was received by the IRS on April 15, 2013, indicating a timely filing.¹⁷ His federal income tax return for 2013 was received by the IRS on March 11, 2016, nearly two years late.¹⁸ It is unclear when Applicant filed his state income tax return for 2013, but he did file an

⁸ Student Loan Obligation Statement, dated May 11, 2016, attached to Applicant’s Response to the FORM.

⁹ Item 4, *supra* note 3, at 9-11.

¹⁰ Receipts, dated May 24, 2016, attached to Applicant’s Response to the FORM.

¹¹ Item 4, *supra* note 3, at 11.

¹² Item 2, *supra* note 3, at 2.

¹³ Item 3, *supra* note 1, at 40.

¹⁴ Item 3, *supra* note 1, at 35.

¹⁵ Item 2, *supra* note 3, at 2.

¹⁶ Tax Return Transcript (2011), dated May 6, 2016, attached to Applicant’s Response to the FORM.

¹⁷ Tax Return Transcript (2012), dated May 6, 2016, attached to Applicant’s Response to the FORM.

¹⁸ Tax Return Transcript (2013), dated May 6, 2016, attached to Applicant’s Response to the FORM.

amended return shortly before May 25, 2016.¹⁹ The status of Applicant's state income tax returns for 2011 and 2012 is unclear as Applicant failed to address those issues, and he failed to submit any documentation to indicate that he filed his state income tax returns for those years.

According to Applicant's federal income tax returns, he had adjusted gross incomes of \$38,420 in 2011; \$41,609 in 2012; and \$58,363 in 2013.²⁰ Applicant did not submit a Personal Financial Statement to reflect his current net monthly income; monthly expenses; or any monthly remainder that might be available for discretionary spending or savings. There is no evidence of a budget. There is no evidence of any financial counseling. It remains unclear if Applicant's finances are under control.

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."²¹ 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. The President has authorized the Secretary of Defense or his designee to grant an applicant eligibility for access to classified information "only upon a finding that it is clearly consistent with the national interest to do so."²²

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the AG. In addition to brief introductory explanations for each guideline, the AG list potentially disqualifying conditions and mitigating conditions, which are used in evaluating an applicant's eligibility for access to classified information.

An administrative judge need not view the guidelines as inflexible, ironclad rules of law. Instead, acknowledging the complexities of human behavior, these guidelines are applied in conjunction with the factors listed in the adjudicative process. The administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense decision. The entire process is a conscientious scrutiny of a number of variables known as the "whole-person concept." The administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable, in making a meaningful decision.

¹⁹ Personal Income Tax Computation Notice, dated May 25, 2016, attached to Applicant's Response to the FORM.

²⁰ Tax Return Transcripts for 2011-2013, *supra* notes 16-18.

²¹ *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988).

²² Exec. Or. 10865, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960), as amended and modified.

In the decision-making process, facts must be established by “substantial evidence.”²³ The Government initially has the burden of producing evidence to establish a potentially disqualifying condition under the Directive, and has the burden of establishing controverted facts alleged in the SOR. Once the Government has produced substantial evidence of a disqualifying condition, under Directive ¶ E3.1.15, the applicant has the burden of persuasion to present evidence in refutation, explanation, extenuation or mitigation, sufficient to overcome the doubts raised by the Government’s case. The burden of disproving a mitigating condition never shifts to the Government.²⁴

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 and endures throughout off-duty hours as well. It is because of this special relationship that the Government must be able to repose a high degree of trust and confidence in those individuals to whom it grants access to classified information. 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 as to potential, rather than actual, risk of compromise of classified information. Furthermore, “security clearance determinations should err, if they must, on the side of denials.”²⁵

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.”²⁶ 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 as to Applicant’s allegiance, loyalty, or patriotism. It is merely an indication the Applicant has or has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance. In reaching this decision, I have drawn only those conclusions that are reasonable, logical, and based on the evidence contained in the record. Likewise, I have avoided drawing inferences grounded on mere speculation or conjecture.

Analysis

Guideline F, Financial Considerations

The security concern relating to the guideline for Financial Considerations is set out in AG ¶ 18:

²³ “Substantial evidence [is] such relevant evidence as a reasonable mind might accept as adequate to support a conclusion in light of all contrary evidence in the record.” ISCR Case No. 04-11463 at 2 (App. Bd. Aug. 4, 2006) (citing Directive ¶ E3.1.32.1). “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).

²⁴ See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).

²⁵ *Egan*, 484 U.S. at 531.

²⁶ See Exec. Or. 10865 § 7.

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 guideline notes several conditions that could raise security concerns. Under AG ¶ 19(a), an "inability or unwillingness to satisfy debts" is potentially disqualifying. Similarly, under AG ¶ 19(c), "a history of not meeting financial obligations" may raise security concerns. Under AG ¶ 19(g), security concerns may be raised when there is a "failure to file annual Federal, state, or local income tax returns as required or the fraudulent filing of the same." Applicant's financial problems initially arose in November 2008, and increased during the ensuing years. Accounts became delinquent. A vehicle was voluntarily repossessed; student loans went into default; a rental property was foreclosed; and federal and state income tax returns were not timely filed. He accrued numerous parking, speeding, or red light violations. AG ¶¶ 19(a), 19(c), and 19(g) apply.

The guideline also includes examples of conditions that could mitigate security concerns arising from financial difficulties. Under AG ¶ 20(a), the disqualifying condition may be mitigated where "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." Also, under AG ¶ 20(b), financial security concerns may be mitigated where "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." Evidence that "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" is potentially mitigating under AG ¶ 20(c). Similarly, AG ¶ 20(d) applies where the evidence shows "the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts."²⁷

AG ¶¶ 20(b) and 20(d) minimally apply. AG ¶¶ 20(a) and 20(c) do not apply. Because of the nature, frequency, and recency of Applicant's continuing financial difficulties, I am unable to conclude that it occurred "so long ago" or "was so infrequent."

²⁷ 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 [or statute of limitations]) 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)).

As noted above, during unspecified periods from November 2008 and November 2014, Applicant's wife had been "sporadically employed." He claimed that things became worse towards the end of 2010, when she lost her job, and the entire family financial responsibility became his. He offered no documentation to reflect her income for the years during that entire period. He claimed that he exhausted his resources, but he never explained or offered documentation to identify those resources or how they were depleted. Furthermore, despite having exhausted his resources, Applicant still chose to obtain student loans to fund his education at a vocational college from 2010 until 2013.

Applicant's annual adjusted gross income increased from \$38,420 in 2011 to \$58,363 in 2013, but he still failed to take any positive action to resolve his delinquent accounts. Tickets accrued from 2010 through 2013 for various parking, speeding, or red light violations (with fines of \$300, \$100, \$100, \$100, \$85, \$85, and \$55) were ignored until five months after the SOR was issued. There is little evidence to indicate efforts to contact his creditors to arrange repayment plans, and during the period November 2008 until January 2015, Applicant simply ignored his creditors. In January 2015, he finally made the initial efforts to rehabilitate his student loans, and he started making modest monthly payments. He failed to timely file his federal income tax returns for the tax years 2011 and 2013 because of missing documentation. Applicant failed to adequately address his untimely filing of his state income tax returns for the tax years 2011 through 2013. Applicant was interviewed by an OPM investigator in November 2014. That is when he should have started his good-faith resolution efforts. He failed to do so.

The record establishes that Applicant failed to timely file his federal income tax returns for tax years 2011 and 2013, and his state income tax returns for the tax years 2011, 2012, and 2013. The DOHA Appeal Board has commented:²⁸

Failure to file tax returns suggests that an applicant has a problem with complying with well-established governmental rules and systems. Voluntary compliance with such rules and systems is essential for protecting classified information. ISCR Case No. 01-05340 at 3 (App. Bd. Dec. 20, 2002). As we have noted in the past, a clearance adjudication is not directed at collecting debts. See, e.g., ISCR Case No. 07-08049 at 5 (App. Bd. Jul. 22, 2008). By the same token, neither is it directed toward inducing an applicant to file tax returns. Rather, it is a proceeding aimed at evaluating an applicant's judgment and reliability. *Id.* A person who fails repeatedly to fulfill his or her legal obligations does not demonstrate the high degree of good judgment and reliability required of those granted access to classified information.

²⁸ ISCR Case No. 14-04437 at 3 (App. Bd. Apr. 15, 2016). See ISCR Case No. 14-05476 at 5 (App. Bd. Mar. 25, 2016) (citing ISCR Case No. 01-05340 at 3 (App. Bd. Dec. 20, 2002)). ISCR Case No. 14-01894 at 4-5 (App. Bd. Aug. 18, 2015). The Appeal Board clarified that even in instances where an "[a]pplicant has purportedly corrected [the applicant's] federal tax problem, and the fact that [applicant] is now motivated to prevent such problems in the future, does not preclude careful consideration of [a]pplicant's security worthiness in light of [applicant's] longstanding prior behavior evidencing irresponsibility" including a failure to timely file federal income tax returns. See ISCR Case No. 15-01031 at 3 and note 3 (App. Bd. June 15, 2016) (characterizing "no harm, no foul" approach to an Applicant's course of conduct and employed an "all's well that ends well" analysis as inadequate to support approval of access to classified information with focus on timing of filing of tax returns after receipt of the SOR).

See, e.g., ISCR Case No. 14-01894 at 5 (App. Bd. Aug. 18, 2015). See *Cafeteria & Restaurant Workers Union Local 473 v. McElroy*, 284 F.2d 173, 183 (D.C. Cir. 1960), *aff'd*, 367 U.S. 886 (1961).

Applicant procrastinated in taking steps to resolve his delinquent debts since 2010 (when he first received various parking, speeding, or red light violations); since 2012 (when his automobile loan was charged off); and 2013 (when a medical account went unpaid). It is unclear when his student loans went into default. With the exception of his delinquent student loans, which he finally took steps to rehabilitate after his OPM interview, Applicant offered little evidence of a good-faith effort to resolve any of his other accounts. His tickets for various parking, speeding, or red light violations were finally paid off, and he made his initial modest payments on his charged-off automobile loan, only after the FORM was issued. He addressed, to some degree, his federal and state income tax return issues, also only after the FORM was issued. He contended he paid off a medical account, but he failed to submit any documentation such as receipts, cancelled checks, account records, etc., to support his contentions.

There is no evidence of a budget, financial counseling, or that his finances are under control. In failing to timely file his various federal and state income tax returns, and to resolve his long-standing delinquent debts until the FORM was issued, Applicant appears to have acted imprudently and irresponsibly. Applicant's actions, or inactions, under the circumstances confronting him, continue to cast doubt on his current reliability, trustworthiness, and good judgment.²⁹

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. Moreover, I have

²⁹ See ISCR Case No. 09-08533 at 3-4 (App. Bd. Oct. 6, 2010).

evaluated the various aspects of this case in light of the totality of the record evidence and have not merely performed a piecemeal analysis.³⁰

There is some evidence in favor of mitigating Applicant's conduct. There is no evidence of misuse of information technology systems, mishandling protected information, or substance abuse. He candidly acknowledged having some financial difficulties when he completed his e-QIP. He finally took action to resolve some debts.

The disqualifying evidence under the whole-person concept is simply more substantial. Applicant's explanation for his failure to comply with the law related to the timely filing of his federal and state income tax returns is simply too simplistic. He may have lost some documentation required to be attached to his income tax returns to meet the original filing dates, but he continued to ignore his filing responsibilities for several years thereafter. He offered no meaningful explanations for his failure to maintain his accounts in a current status, or why he did not take any earlier positive actions to resolve them well before the SOR or the FORM were issued. There is no evidence of a budget, financial counseling, or that his finances are under control.

Overall, the evidence leaves me with substantial questions and doubts as to Applicant's security worthiness. For all of these reasons, I conclude Applicant has failed to mitigate the security concerns arising from his financial considerations. See AG ¶ 2(a)(1) through AG ¶ 2(a)(9).

Formal Findings

Formal findings for or against Applicant on the allegations set forth in the SOR, as amended, 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.g.:	For Applicant
Subparagraphs 1.h. through 1.m.:	Against Applicant
Subparagraph 1.n.:	Against Applicant
Subparagraph 1.o.:	Against Applicant
Subparagraphs 1.p. and 1.q.:	Against Applicant

³⁰ See *U.S. v. Bottone*, 365 F.2d 389, 392 (2d Cir. 1966); See also ISCR Case No. 03-22861 at 2-3 (App. Bd. Jun. 2, 2006).

Conclusion

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with the national interest to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is denied.

ROBERT ROBINSON GALES
Administrative Judge