



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



In the matter of:)	
)	
REDACTED)	ISCR Case No. 15-05059
)	
Applicant for Security Clearance)	

Appearances

For Government: Benjamin R. Dorsey, Esq., Department Counsel
For Applicant: *Pro se*

02/14/2017

Decision

MENDEZ, Francisco, Administrative Judge:

Applicant did not present sufficient evidence to mitigate security concerns raised by his financial circumstances. After receiving an unfavorable clearance decision in 2013, he took some steps to address his delinquent accounts and put his financial house in order. However, he has yet to take action to address long-standing debts, including federal taxes, and did not present sufficient evidence of financial reform to mitigate the security concerns raised by his financial situation. Clearance is denied.

Statement of the Case

On December 31, 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 hearing to re-establish his eligibility for access to classified information.

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.

On September 27, 2016, a date mutually agreed to by the parties, a hearing was held.² Applicant testified at the hearing, and Government Exhibits 1 – 5 and Applicant's Exhibits A – D were admitted into the administrative record without objection. Applicant timely submitted Exhibits E – I post-hearing and they were also admitted into the record without objection.³ The Defense Office of Hearings and Appeals (DOHA) received the transcript (Tr.) on October 5, 2016, and the record closed on November 4, 2016.⁴

Findings of Fact

Applicant, who is in his forties, is married with two children. He is a software engineer working on unclassified projects for Company A. He is being sponsored for a clearance by Company B. He worked for Company B on classified projects before his clearance was revoked in about June 2013, following an adverse decision by another DOHA administrative judge that was subsequently affirmed. He was unemployed from September 2013 to May 2014, when he was hired by his current employer. His current annual salary is over \$100,000.⁵

Applicant's financial problems date back to 2007. He claims that his wife, who owns her own business, did not set aside a sufficient amount to pay federal payroll taxes.⁶ During a clearance interview in 2011, Applicant stated that this issue caused him to not file his 2007, 2008, and 2009 personal federal income tax returns. At hearing, he corrected this prior statement to reflect that he filed his tax returns, but did not pay the income taxes owed.⁷ He then claimed to be paying his delinquent taxes through an installment agreement with the IRS. Upon being questioned by Department Counsel, Applicant corrected his earlier testimony, stating that he stopped paying on the installment agreement around the time of the 2013 DOHA hearing.⁸

Applicant's tax-related debt has continued to grow since the 2013 security clearance hearing. He took early withdrawals from his 401(k) retirement account totaling about \$50,000 to \$60,000. He did not set aside a sufficient amount to pay the taxes and penalties due as a result of the early withdrawal. He testified that he was making

² Documents reflecting Applicant's continued sponsorship for a clearance and other non-substantive, administrative documents are attached to the record as Appellate Exhibits (App. Exh.) I – IV.

³ App. Ex. V (waiver of objection to post-hearing exhibits). Applicant submitted seven attachments via e-mail on November 3, 2016. Attachments 1-3 were marked Exhibits E - G, Attachments 4-6 were collectively marked Exhibit H, and Attachment 7 was marked Exhibit I.

⁴ The original deadline for submission of post-hearing matters was October 21, 2016, but I extended the deadline at Applicant's request. App. Exh. VI.

⁵ Tr. 8, 26-27, 36; Exhibit 1.

⁶ Tr. 28-30; Exhibit 5 at 3.

⁷ Compare, Exhibit 5 at 3, with, Tr. 28-30.

⁸ Compare, Tr. 29, with, Tr. 57.

payments to the IRS to reduce his tax debt. He claimed to have submitted eight payments to the IRS over the past twelve months. He promised to provide documentation post-hearing reflecting the payments, but did not.⁹

Post-hearing, Applicant did submit documentation showing that he had filed his 2009 – 2015 tax returns. He owes over \$30,000 in past-due taxes for tax years 2008 through 2010, and 2014. He submitted a written budget that reflects a purported \$200 monthly payment to the IRS to address his delinquent federal tax debt. But, as previously noted, provided no evidence of having actually made any such payments.¹⁰

Applicant acknowledges responsibility for his current financial situation, including spending beyond his means for several years (e.g., twice yearly vacations to the Caribbean). His financial situation was also negatively impacted by the recent economic recession. In 2010, Applicant found himself unemployed for a short period of time and unable to pay the mortgage on his former residence.¹¹

Applicant purchased his former home in 2001. He financed the purchase price through loans totaling approximately \$500,000. He refinanced in 2006, increasing his total mortgage-related debt to about \$700,000. In 2010, the monthly mortgage payments reset, going from approximately \$2,900 to about \$4,800. Applicant, who was unemployed from February to July 2010, was unable to afford the higher monthly mortgage payments. He attempted a mortgage modification and was advised not to make his mortgage payments while negotiating with the lender. About a year later, his lender denied the modification request. Applicant eventually resolved the delinquent mortgage debts through a short sale in March 2016. He submitted documentation that the home equity loan on his home, totaling about \$149,000, was settled for \$6,000. He also submitted documentation showing he paid a minor \$370 judgment and brought current a credit card account that had been past due. These debts are referenced in SOR 1.a, 1.b, and 1.d. These SOR debts are resolved.¹²

SOR 1.b lists a charged-off credit card account totaling about \$6,300. Applicant was asked about this delinquent account during his 2011 clearance interview. At the time, Applicant claimed he was making \$200 monthly payments to resolve the debt. In his Answer to the SOR, Applicant stated that he had contacted the creditor and, beginning in March 2016, would forward monthly payments to the creditor to resolve the debt. At hearing, Applicant acknowledged that he had not followed through with his promise to pay this debt. He testified that this debt was “a lower priority” item, because it involved a credit card that he could not use. The debt remains unresolved.¹³

⁹ Tr. 53-66.

¹⁰ Exhibits H, I.

¹¹ Tr. 50-51, 75-76; Exhibit 5 at 4, 8-9.

¹² Tr. 31-34; Exhibit 1 at 48-53, Exhibit 5 at 4-5, 18; Exhibits B – F.

¹³ Tr. 34-40; Exhibit 5 at 4.

Applicant and his wife have taken some positive steps to remedy their financial situation, including receiving advice from a new financial planner. He testified that, other than the tax-related debt, he has resolved all the SOR debts that were the subject of the 2013 unfavorable clearance decision. Applicant's wife is looking to restart her company and hired an accountant to avoid the pitfalls that previously befell the business. They have reduced their monthly expenses, moving to an affordable rental property.¹⁴ At hearing, Applicant claimed that these steps resulted in a net monthly remainder (income minus expenses) "roughly around \$400 to \$500." Post-hearing, however, he submitted a written budget that reflects a net monthly remainder of less than \$90.¹⁵ His savings account has a balance of approximately \$120.¹⁶ He submitted favorable reference letters from former co-workers and a long-time friend.¹⁷

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.

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

¹⁴ Tr. 48-55, 62-63.

¹⁵ Compare Tr. 59-60, with, Exhibit I.

¹⁶ Tr. 51.

¹⁷ Exhibit G.

of protecting national security, the Supreme Court has held that “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

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.¹⁸

As stated in the relevant portion of AG ¶ 18 quoted above, the security concern at issue is not limited to a consideration of whether a person with financial issues might be tempted to compromise classified information or engage in other illegality to pay their debts. It also addresses the extent to which the circumstances giving rise to delinquent debt cast doubt upon a person’s judgment, self-control, and other qualities essential to protecting classified information.¹⁹

Applicant’s history of financial issues dates back to 2007 and continues to the present day. This record evidence raises the Guideline F security concern and the disqualifying conditions at AG ¶¶ 19(a) and 19(c).²⁰

Once a disqualifying condition is established, the burden shifts to an applicant to present evidence demonstrating extenuation or mitigation sufficient to warrant a favorable security clearance decision. In assessing Applicant’s case, I have considered all the available mitigating conditions, including the following:

¹⁸ AG ¶ 18.

¹⁹ ISCR Case No. 11-05365 at 3 (App. Bd. May. 1, 2012).

²⁰ (a) “inability or unwillingness to satisfy debts,” and (b) “a history of not meeting financial obligations.”

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 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 financial issues were, at a minimum, exacerbated by matters beyond his control. He has taken some positive steps to address his financial situation, including resolving three of the four SOR debts. However, the mitigating value of this favorable evidence is offset or undercut by:

1. Applicant's tax-related financial issues, which he has not addressed and continue to get worse, despite the 2013 adverse clearance decision and his gainful employment earning a six-figure salary.²¹
2. Applicant's repeated, unkept promises during the current and past security clearance process to address his delinquent debts, including the debt listed in SOR 1.b.
3. The lack of clarity regarding the actual state of Applicant's current finances, which leaves me unable to clearly find that his financial situation is under control and similar financial issues are unlikely to recur.

Individuals applying for a security clearance are not required to be debt free. They are also not required to resolve all past-due debts simultaneously or even resolve the delinquent debts listed in the SOR first. However, they are expected to present documentation to refute, explain, or mitigate security concerns raised by their circumstances, to include the accumulation of delinquent debt. Moreover, they bear the

²¹ Applicant's tax-related debts were not alleged in the SOR. Accordingly, I have not considered this information as a disqualifying factor. Instead, I have examined this information in the context of considering the circumstances that contributed to Applicant's current financial situation, his response to it, and in assessing his mitigation case. Applicant was specifically placed on notice that I would use this information for this limited purpose and was provided over a month after the hearing to submit documentation to substantiate his testimony that he had addressed his federal tax delinquency. (Tr. 28-30.) *Contrast with*, ISCR Case No. 12-11375 (App. Bd. June 17, 2016) (judge erred in manner in which considered non-alleged tax issues without providing adequate notice to applicant).

burden of showing that they manage their finances in a manner expected of those granted eligibility for a security clearance.²² This is the heavy burden of persuasion that all prospective and active clearance holders must meet before they can be granted eligibility for a security clearance.

Here, Applicant failed to meet his burden of persuasion. Specifically, I find that the mitigating conditions listed at AG ¶¶ 20(b), 20(c), and 20(d) apply in full or in part. However, even when these matters are considered together with the favorable whole-person factors present in this case (some of which are noted below), it is insufficient to mitigate the security concerns at issue.

Whole-Person Concept

Under the whole-person concept, an administrative judge must evaluate an applicant's eligibility for a security clearance by considering the totality of an applicant's conduct and all the relevant circumstances. An administrative judge should consider the non-exclusive factors listed at AG ¶ 2(a). I hereby incorporate my above analysis and highlight some additional whole-person factors.

At hearing, Applicant appeared sincere in his desire to regain his eligibility for a security clearance in order to contribute to the national defense. He has made some positive strides since the unfavorable 2013 clearance decision to address his financial situation and show that he can again be entrusted with classified information. However, his current financial situation is, in part, attributable to a failure to set aside a sufficient amount to pay his federal income taxes from 2007 to 2010. Recently, he again placed his personal finances over his obligation to pay his taxes by failing to set aside a sufficient amount to pay the taxes and penalties due after taking an early withdrawal from his 401(k) retirement account. His federal tax debt stands at over \$30,000 and, despite full-time employment and earning a six-figure salary, Applicant has yet to take action to address this debt.²³ In short, Applicant did not present sufficient evidence of financial reform to fully mitigate the security concerns raised by his financial situation.

Overall, after weighing the evidence, both favorable and unfavorable, I find that Applicant did not meet his burden of persuasion. At present, doubts and questions remain regarding Applicant's eligibility for a security clearance.

²² ISCR Case 07-10310 at 2 (App. Bd. Jul. 30, 2008).

²³ See *generally*, ISCR Case No. 14-03358 at 3 (App. Bd. Oct. 9, 2015) ("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.").

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): AGAINST APPLICANT

Subparagraphs 1.a, 1.c, and 1.d:

For Applicant

Subparagraph 1.b:

Against Applicant

Conclusion

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

Francisco Mendez
Administrative Judge