



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



In the matter of:

[NAME REDACTED]

Applicant for Security Clearance

ISCR Case No. 15-05067

Appearances

For Government: Chris Morin, Esq., Department Counsel

For Applicant: Erin M. Estevez, Esq.

Thomas O. Mason, Esq.

10/21/2016

Decision

MALONE, Matthew E., Administrative Judge:

Applicant mitigated the security concerns raised by his financial problems and by his failure to timely file federal and state income taxes as required. His request for a security clearance is granted.

Statement of the Case

On July 17, 2013, Applicant submitted an Electronic Questionnaire for Investigations Processing (EQIP) to obtain 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 continue to receive a security clearance.¹

On December 18, 2015, DOD issued a Statement of Reasons (SOR) alleging facts which raise security concerns addressed under the adjudicative guideline² for

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

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).

financial considerations (Guideline F). Applicant timely responded to the SOR (Answer) and requested a hearing. The case was assigned to an administrative judge on March 20, 2016, and a hearing was scheduled for April 14, 2016. One week before the hearing, Applicant requested a continuance. The request was granted, and the case was transferred to me on May 18, 2016. I convened a hearing on June 30, 2016. The parties appeared as scheduled. Department Counsel presented Government Exhibits (Gx.) 1 - 4.³ Applicant testified and presented Applicant's Exhibits (Ax.) 1 - 18. Two witnesses testified for Applicant. A transcript of the hearing (Tr.) was received on July 14, 2016.

Findings of Fact

Under Guideline F, the Government alleged that Applicant did not timely file his federal income tax returns for tax years 2010 - 2012 (SOR 1.a); that he did not timely file his state income tax returns for 2010 - 2012 (SOR 1.b); and that he owed at least \$57,486⁴ for 11 delinquent or past-due debts (SOR 1.c - 1.m). In response, Applicant admitted, with explanations, all of the SOR allegations (Answer). In addition to the facts established through Applicant's admissions, I make the following findings of fact.

Applicant is 35 years old and works for a defense contractor in a job for which he was hired in August 2009. His work requires eligibility for access to classified information. From April 2002 until April 2010, Applicant served in the United States Army on active duty and in the Army Reserve. He has held a security clearance without interruption since September 2002. (Gx. 1; Tr. 17 - 19)

Applicant got married in June 2009, but he and his wife separated just two months later. They have one child together and neither party has initiated formal divorce proceedings. In 2007, Applicant bought a house in State A in which he and his wife lived until they separated. Applicant remained in the house after his wife and child moved out, but relocated to State B for work in April 2010. The house remained empty until early 2011, when he rented out the house. The tenant paid him a security deposit and the first month's rent, but never paid rent after moving in. She also did not properly care for the property and extensive damage ensued. Applicant tried on several occasions to have the tenant evicted. However, Applicant had rented out the house without first registering it as a rental property as required by local ordinances, a requirement of which he was previously unaware. Because the property was not registered, Applicant could not legally evict his tenant and reclaim the property. Applicant's tenant knew this because she was an employee of the city's housing authority, and she refused to leave the property for two years. His efforts to seek relief from the city in the form of eviction assistance or retroactive property registration were unsuccessful. Once the tenant did leave, it became apparent he could not afford to repair the structural damage left behind. (Answer; Gx. 1; Gx. 2; Tr. 32 - 35)

Since April 2010, Applicant has been living and working in State B, and he had hoped to use rent revenues to cover the mortgage on his home in State A. He started communicating with the mortgage lender (identified in SOR 1.c) in 2011 in the hopes of obtaining a mortgage modification or approval for a short sale. But the bank did not

³ At Department Counsel's request, I have included, as Hearing Exhibit (Hx.) 1, a copy of the March 8, 2016 letter that forwarded Gx. 1 - 4 to Applicant, in accordance with Directive Section E3.1.13. Also included, as Hx. 2, is a list identifying those exhibits.

⁴ No dollar amount was specified for the debt alleged at SOR 1.e.

work with Applicant because he was not far enough in arrears. He was able to use savings to make some mortgage payments and defray the losses from his lack of rental, but he made his last mortgage payment sometime in 2012. Ultimately, the mortgage was foreclosed. Applicant received an IRS 1099-A (Acquisition or Abandonment of Property) form showing that the fair market value of the home when the mortgage was foreclosed was \$45,000, but the remaining mortgage at the time was about \$100,000. He has not yet received an IRS 1099-C (Cancellation of Debt). He will have to declare a yet to be determined portion of the remaining mortgage as taxable income, but he does not have any remaining obligation to pay the mortgage. (Answer; Gx. 1; Gx. 2; Ax. 13; Tr. 34 - 35, 58 - 64, 71)

Applicant also did not timely file his federal or state income tax returns as required for the 2009 - 2012 tax years. He attributed his conduct in this regard to a combination of procrastination, a general lack of motivation after he and his wife separated, an inability to gather his W-2 forms and other necessary documents after he moved to State B, and in one instance, a lack of documentation after a previous employer went out of business. Applicant also attributed his procrastination to his belief that he would receive refunds for the years he did not file. He has always claimed zero exemptions from withholding so he was sure he would pay enough tax each year. He testified at hearing, however, that he understood at all times that he was required to meet his tax filing obligations. Applicant has since hired an accountant and all of his past-due federal and state returns have been filed. He is in repayment plans for the 2009 and 2010 tax years, and refunds from the remaining tax years have been diverted and applied to those years for which he owed taxes. Available information shows Applicant is again in good standing as to his federal and state income tax obligations. (Answer; Ax. 2 - 12; Tr. 46 - 50, 52 - 58, 64 - 65, 69 - 70)

Applicant also accrued several smaller debts after the end of his marriage and during his relocation. The debt at SOR 1.d is for an overpayment of tuition by the Department of Veterans Affairs (VA) while Applicant was studying at a community college in State B. It became delinquent because he was away on extended temporary duty for work when the bill arrived. He paid the SOR 1.d debt in April 2015. The debts at SOR 1.e - 1.h, and 1.i are for cable, cell phone, home security system, and utility bills Applicant either was late in paying or did not receive final billing after moving to State B. SOR 1.i - 1.k are unpaid medical co-payments related to his son. SOR 1.m is for a speeding ticket issued from a traffic camera system. Applicant also did not receive it before he moved. With the exception of SOR 1.e, Applicant paid most of those debts in September 2013. SOR 1.h and 1.k were paid in April 2015 and January 2016, respectively. Applicant has been unable to verify information about the debt alleged at SOR 1.e. It remains unresolved. (Answer; Ax. 13 - 18; Tr. 36 - 48)

Applicant's current finances are sound. He lives modestly and within his means. After paying all of his regular monthly expenses and ongoing tax debt and other payments, he has almost \$4,000 remaining each month. His monthly expenses also include \$600 child support payments. He is using his remaining money to rebuild his savings and accelerate repayment of his tax debts. A former co-worker, fellow soldier, and current roommate who has known Applicant for ten years testified that Applicant lives responsibly and is trustworthy and reliable. He also has observed Applicant's handling of classified information, and reports Applicant is conscientious and shows good judgment in that capacity. Another witness, with whom Applicant worked on a previous contract and who recommended Applicant be hired for his current position, regards Applicant as professional and trustworthy. He also has observed that Applicant handles classified information properly. Both witnesses recommended Applicant be

granted a clearance despite the adverse financial information in his background. (Answer; Tr. 51 - 52, 65 - 68, 72 - 73, 75 - 76, 79 - 103)

Policies

Each security clearance decision must be a fair, impartial, and commonsense determination based on examination of all available relevant and material information,⁵ 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 interest⁶ 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.⁷ 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 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.⁸

⁵ See Directive, 6.3.

⁶ See *Department of the Navy v. Egan*, 484 U.S. 518 (1988).

⁷ See *Egan*, 484 U.S. at 528, 531.

⁸ See *Egan*; AG ¶ 2(b).

Analysis

Financial Considerations

Available information is sufficient to support the SOR allegations under this guideline. The facts established 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.

Applicant did not timely file his federal and state income tax returns for tax years 2009 - 2012. He also incurred significant unpaid debts through past-due taxes, his default on the mortgage for his house in State A, and ten other smaller past-due or delinquent debts. The foregoing requires application of the disqualifying conditions at AG ¶ 19(a) (*inability or unwillingness to satisfy debts*); AG ¶ 19(c) (*a history of not meeting financial obligations*); and AG ¶ 19(g) (*failure to file annual Federal, state, or local income tax returns as required or the fraudulent filing of the same*).

I have also 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;

(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

(d) the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts.

The circumstances underlying Applicant's mortgage foreclosure were largely beyond his control. The Government has suggested that Applicant engaged in a strategic default on his mortgage obligation. (Tr. 103) I disagree. Strategic default is a deliberate decision by a borrower, who is still able to pay for a property that is otherwise viable, but who also has determined or been advised that continued performance no longer is in his or her best financial interest. In other words, the borrower no longer likes the deal he made. That did not occur here. Applicant tried to carry his mortgage as best he could despite his tenant's malfeasance. But he was unable to pay after a certain point in 2012. He eventually was left with a damaged property that he could neither repair nor sell. Also contributing to Applicant's dilemma was the mortgage lender's unwillingness to work with him to either modify the mortgage or to agree to a short sale. At worst, the foreclosure will result in debt forgiveness by the mortgage lender that will

be declared as taxable income. This aspect of Applicant's financial problems arose through circumstances beyond his control. His response to those circumstances does not reflect adversely on his judgment and reliability. I conclude from all of the foregoing that AG ¶¶ 20(a) and 20(b) apply to SOR 1.c.

As to SOR 1.d - 1.m, Applicant provided sufficient information to support his claims that they became delinquent around the time he was moving to State B and that he was unaware they were due. He paid most of them in September 2013, and with one exception, he has resolved all of those debts. I conclude AG ¶¶ 20(a) - 20(d) apply to SOR 1.d - 1.m.

As to Applicant's failure to file his federal and state income taxes from 2009 - 2012, he has acknowledged that it was not proper for him to ignore his responsibilities in this regard. His explanations for not timely filing his returns are based on a mixture of understandable upheaval in his personal life and unacceptable procrastination. It was not until after the SOR was issued that Applicant filed his past-due returns and brought his filing status current. Nonetheless, in view of the positive information about his current finances, as well as his overall judgment and reliability, I conclude Applicant is not likely to again fail in his income tax reporting obligations or to incur new delinquent debts. On balance, available information is sufficient to support application of the mitigating conditions at AG ¶¶ 20(a) - (d) to SOR 1.a and 1.b.

I also have evaluated this record in the context of the whole-person factors listed in AG ¶ 2(a). Applicant is an honorably-discharged Army veteran who has continued to support Army missions through his civilian employment. Personal and professional references who are aware he has had financial problems nonetheless speak highly of his professionalism and reliability. Also reflective of good judgment is the fact that Applicant was already acting three years ago to resolve those debts he was able to pay. Applicant has resolved his tax issues and is unlikely, by virtue of his improved personal and professional circumstances, and in light of his current financial health, to repeat his past failures in that regard. A fair and commonsense assessment of the record evidence as a whole supports a conclusion that the security concerns about Applicant's finances have been 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.m: 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