



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



In the matter of:)
)
) ISCR Case No. 15-03760
)
Applicant for Security Clearance)

Appearances

For Government: Alison O’Connell, Esq., Department Counsel
For Applicant: *Pro se*

04/12/2018

Decision

HARVEY, Mark, Administrative Judge:

Applicant did not make sufficient progress resolving his delinquent debts. Financial considerations security concerns are not mitigated. Eligibility for access to classified information is denied.

Statement of the Case

On July 14, 2014, Applicant completed and signed a Questionnaire for National Security Position (SF 86) or security clearance application (SCA). Item 4. On December 10, 2015, the Department of Defense (DOD) Consolidated Adjudications Facility (CAF) issued a statement of reasons (SOR) to Applicant under Executive Order (Exec. Or.) 10865, *Safeguarding Classified Information within Industry*, February 20, 1960; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), January 2, 1992; and the *Adjudicative Guidelines for Determining Eligibility for Access to Classified Information*, effective on September 1, 2006. Item 1. The SOR set forth security concerns arising under the financial considerations guideline. Item 1.

The SOR detailed reasons why the DOD CAF did not find under the Directive that it is clearly consistent with the interests of national security to grant or continue a security clearance for Applicant and recommended referral to an administrative judge to determine whether a clearance should be granted, continued, denied, or revoked.

Specifically, the SOR set forth security concerns arising under Guideline F (financial considerations). Item 1.

On March 1, 2016, Applicant provided a response to the SOR. Item 3. On September 14, 2017, Department Counsel completed a File of Relevant Material (FORM) including eight exhibits. Items 1-8. On September 26, 2017, Applicant acknowledged receipt of the FORM. Applicant did not object to the evidence in the FORM, and Items 1-8 are admitted into evidence. Applicant did not respond to the FORM. On January 17, 2018, the case was assigned to me.

The Director of National Intelligence (DNI) issued Security Executive Agent Directive 4, establishing in Appendix A the new adjudicative guidelines (AGs), which he made applicable to all covered individuals who require initial or continued eligibility for access to classified information or eligibility to hold a sensitive position on or after June 8, 2017. The new AGs supersede the previous AGs. Accordingly, I have evaluated Applicant's security clearance eligibility under the new AGs.¹

Findings of Fact²

In Applicant's SOR response, he admitted responsibility for the debts in SOR ¶¶ 1.a through 1.p and the allegations relating to his federal income taxes in SOR ¶¶ 1.q and 1.r. Item 3. His admissions are accepted as findings of fact.

Applicant is 47-year-old information technology director, and a DOD contractor has employed him since October 2013.³ For most of the past 18 years, he has been employed in information technology. He has completed some college credits; however, he has not received a degree. He was unemployed for five months in 2012. He has never served in the military, and he does not have any prior federal service. In 1996, he married, and in 2004, he divorced. His children were born in 1995 and 1998. Since 2012, he has lived with a cohabitant.

Financial Considerations

The SOR alleges the 16 delinquent debts totaling about \$29,000: ¶ 1.a is a charged-off debt for \$8,506 relating to a repossessed motorcycle; ¶ 1.b is a charged-off bank debt for \$7,540; ¶¶ 1.c and 1.n are student loans for \$4,148 and \$2,126 placed for collection; ¶¶ 1.d, 1.i, 1.k, and 1.o are medical debts for \$2,265, \$68, \$207, and \$134 placed for collection; ¶ 1.e is a debt for \$1,101 placed for collection; ¶¶ 1.f, 1.h, and 1.j

¹ Application of the AGs that were in effect as of the issuance of the SOR would not change my decision in this case. The new AGs are available at http://ogc.osd.mil/doha/SEAD4_20170608.pdf.

² Some details were excluded to protect Applicant's right to privacy. Specific information is available in the cited exhibits.

³ The sources for the information in this paragraph and the next paragraph are Applicant's July 14, 2014 Questionnaire for National Security Position (SF 86) or security clearance application (SCA) and his August 27, 2014 Office of Personnel Management personal subject interview. Items 4, 8.

are telecommunications debts for \$890, \$134, and \$52 placed for collection; ¶ 1.g is a charged-off debt for \$427; and ¶¶ 1.l, 1.m, and 1.p are debts for \$787, \$599, and \$134 placed for collection. Item 1. SOR ¶ 1.q alleges Applicant failed to timely file his federal income tax returns for tax years 2009 through 2013. Item 1. SOR ¶ 1.r alleges Applicant owes delinquent taxes for tax years 2009 through 2013. Item 1.

In his July 14, 2014 SCA, Applicant said he owes the following amounts for each tax year: 2007 (\$2,631); 2008 (\$5,200); 2009 (\$6,645); 2010 (\$8,395); 2011 (\$6,644); and 2012 (\$6,582).⁴ He indicated in the comments, “I have an accountant who just filed my back taxes and I am working with the IRS to satisfy the debt.” In January 2007, the IRS filed a tax lien against Applicant’s wages for \$54,387.⁵ In his August 27, 2014 Office of Personnel Management personal subject interview (OPM PSI), he disclosed that he owed the IRS \$6,483 for tax year 2013. Item 8.

In his SOR response, Applicant explained the debts in SOR ¶¶ 1.a through 1.p resulted when Applicant “was not doing well emotionally and made poor decisions.”⁶ The debts are more than five years old, and he has not generated any new delinquent debts. He planned to start resolving these debts after he resolved his tax debts. He lives within his means, and he promised to continue to do so.

Applicant admitted he failed to timely file his tax returns for tax years 2009 through 2013. He did not file because he was worried that he would not be able to pay the taxes and penalties. He has hired an attorney to help him resolve his tax debts. He said, “These taxes have been filed but remain unpaid due to negotiations between my attorney and the IRS.” He promised to safeguard classified information.

In the FORM, Department Counsel noted the absence of corroborating or supporting documentation of resolution of the SOR issues. FORM at 6-7. Aside from Applicant’s uncorroborated statements, there is no documentary evidence, such as

⁴ The source for the information in this paragraph is Applicant’s July 14, 2014 SCA. Item 4.

⁵ Applicant’s SOR does not include the tax lien for \$54,387 or that he failed to timely file and pay his federal income taxes for tax years 2007 and 2008. In ISCR Case No. 03-20327 at 4 (App. Bd. Oct. 26, 2006), the Appeal Board listed five circumstances in which conduct not alleged in an SOR may be considered stating:

- (a) to assess an applicant’s credibility; (b) to evaluate an applicant’s evidence of extenuation, mitigation, or changed circumstances; (c) to consider whether an applicant has demonstrated successful rehabilitation; (d) to decide whether a particular provision of the Adjudicative Guidelines is applicable; or (e) to provide evidence for whole person analysis under Directive Section 6.3.

Id. (citing ISCR Case No. 02-07218 at 3 (App. Bd. Mar. 15, 2004); ISCR Case No. 00-0633 at 3 (App. Bd. Oct. 24, 2003)). See *also* ISCR Case No. 12-09719 at 3 (App. Bd. April 6, 2016) (citing ISCR Case No. 14-00151 at 3, n. 1 (App. Bd. Sept. 12, 2014); ISCR Case No. 03-20327 at 4 (App. Bd. Oct. 26, 2006)). These two allegations will not be considered except for the five purposes listed above.

⁶ The source for the information in this paragraph and the next paragraph is Applicant’s SOR response. Item 3.

completed tax returns or IRS transcripts for tax years 2009 through 2013. The record lacks corroborating or substantiating documentation and detailed explanations of the causes for his financial issues and other mitigating information. The FORM informed Applicant that he had 30 days from the receipt of the FORM “in which to submit a documentary response setting forth objections, rebuttal, extenuation, mitigation, or explanation, as appropriate. . . . If you do not file any objections or submit any additional information . . . your case will be assigned to an Administrative Judge for a determination based solely” on the evidence set forth in this FORM. FORM at 7-8. Applicant did not respond to the FORM.

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.” *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). 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.” *Id.* at 527. The President has authorized the Secretary of Defense or his designee to grant applicant’s eligibility for access to classified information “only upon a finding that it is clearly consistent with the national interest to do so.” Exec. Or. 10865, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960), as amended.

Eligibility for a security clearance is predicated upon the applicant meeting the criteria contained in the adjudicative guidelines. These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied in conjunction with an evaluation of the whole person. An administrative judge’s overarching adjudicative goal is a fair, impartial, and commonsense decision. An administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable.

The Government reposes a high degree of trust and confidence in persons with access to classified information. This relationship transcends normal duty hours and endures throughout off-duty hours. 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 about potential, rather than actual, risk of compromise of classified information. 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.” See Exec. Or. 10865 § 7. Thus, nothing in this decision should be construed to suggest that it is based, in whole or in part, on any express or implied determination about applicant’s allegiance, loyalty, or patriotism. It is merely an indication the applicant has not met the strict guidelines the President, Secretary of Defense, and Director of National Intelligence have established for issuing a clearance.

Initially, the Government must establish, by substantial evidence, conditions in the personal or professional history of the applicant that may disqualify the applicant from

being eligible for access to classified information. The Government has the burden of establishing controverted facts alleged in the SOR. See *Egan*, 484 U.S. at 531. “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). The guidelines presume a nexus or rational connection between proven conduct under any of the criteria listed therein and an applicant’s security suitability. See ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996).

Once the Government establishes a disqualifying condition by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. Directive ¶ E3.1.15. An applicant “has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance.” ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002). The burden of disproving a mitigating condition never shifts to the Government. See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005). “[S]ecurity clearance determinations should err, if they must, on the side of denials.” *Egan*, 484 U.S. at 531; see AG ¶ 2(b).

Analysis

Financial Considerations

AG ¶ 18 articulates the security concern for financial problems:

Failure 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 or sensitive information. . . . An individual who is financially overextended is at greater risk of having to engage in illegal or otherwise questionable acts to generate funds. . . .

The Appeal Board explained the scope and rationale for the financial considerations security concern in ISCR Case No. 11-05365 at 3 (App. Bd. May 1, 2012) (citation omitted) as follows:

This concern is broader than the possibility that an applicant might knowingly compromise classified information in order to raise money in satisfaction of his or her debts. Rather, it requires a Judge to examine the totality of an applicant’s financial history and circumstances. The Judge must consider pertinent evidence regarding the applicant’s self-control, judgment, and other qualities essential to protecting the national secrets as well as the vulnerabilities inherent in the circumstances. The Directive presumes a nexus between proven conduct under any of the Guidelines and an applicant’s security eligibility.

AG ¶ 19 includes three disqualifying conditions that could raise a security concern and may be disqualifying in this case: “(a) inability to satisfy debts”; “(c) a history of not

meeting financial obligations”; and “(f) failure to file or fraudulently filing annual Federal, state, or local income tax returns or failure to pay annual Federal, state, or local income tax as required.” In ISCR Case No. 08-12184 at 7 (App. Bd. Jan. 7, 2010), the Appeal Board explained:

It is well-settled that adverse information from a credit report can normally meet the substantial evidence standard and the government’s obligations under [Directive] ¶ E3.1.14 for pertinent allegations. At that point, the burden shifts to applicant to establish either that [he or] she is not responsible for the debt or that matters in mitigation apply.

Seven financial considerations mitigating conditions under AG ¶ 20 are potentially applicable in this case:

(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, a death, divorce or separation, clear victimization by predatory lending practices, or identity theft), and the individual acted responsibly under the circumstances;

(c) the individual has received or is receiving financial counseling for the problem from a legitimate and credible source, such as a non-profit credit counseling service, and there are clear indications that the problem is being resolved or is under control;

(d) the individual initiated and is adhering to a good-faith effort to repay overdue creditors or otherwise resolve debts;

(e) the individual has a reasonable basis to dispute the legitimacy of the past-due debt which is the cause of the problem and provides documented proof to substantiate the basis of the dispute or provides evidence of actions to resolve the issue;

(f) the affluence resulted from a legal source of income; and

(g) the individual has made arrangements with the appropriate tax authority to file or pay the amount owed and is in compliance with those arrangements.

The DOHA Appeal Board concisely explained Applicant’s responsibility for proving the applicability of mitigating conditions as follows:

Once a concern arises regarding an Applicant's security clearance eligibility, there is a strong presumption against the grant or maintenance of a security clearance. See *Dorfmont v. Brown*, 913 F. 2d 1399, 1401 (9th Cir. 1990), *cert. denied*, 499 U.S. 905 (1991). After the Government presents evidence raising security concerns, the burden shifts to the applicant to rebut or mitigate those concerns. See Directive ¶ E3.1.15. The standard applicable in security clearance decisions is that articulated in *Egan, supra*. "Any doubt concerning personnel being considered for access to classified information will be resolved in favor of the national security." Directive, Enclosure 2 ¶ 2(b).

ISCR Case No. 10-04641 at 4 (App. Bd. Sept. 24, 2013).

A willful failure to timely make (means complete and file with the IRS) a federal income tax return is a misdemeanor-level federal criminal offense.⁷ For purposes of this decision, I am not weighing Applicant's failure to timely file his federal income tax returns against him as a federal crime. The failure to timely file income tax returns has security implications because:

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. 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).

ISCR Case No. 14-04437 at 3 (App. Bd. Apr. 15, 2016) (emphasis in original). See ISCR Case No. 14-05476 at 5 (App. Bd. Mar. 25, 2016) (citing ISCR Case No. 01-05340 at 3

⁷ Title 26 U.S.C. § 7203, willful failure to file return, supply information, or pay tax, reads:

Any person . . . required by this title or by regulations made under authority thereof to make a return, keep any records, or supply any information, who willfully fails to . . . make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor

A willful failure to make tax return, keep records, or supply information when required, is a misdemeanor without regard to existence of any tax liability. *Spies v. United States*, 317 U.S. 492 (1943); *United States v. Walker*, 479 F.2d 407 (9th Cir. 1973); *United States v. McCabe*, 416 F.2d 957 (7th Cir. 1969); *O'Brien v. United States*, 51 F.2d 193 (7th Cir. 1931).

(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 [his or her] 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 [his or her] 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 employing 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).

Applicant did not timely file federal tax returns for tax years 2009 through 2012; however, he may have timely filed his 2013 federal income tax return, if he requested an extension from the IRS. He owes an unspecified amount of federal income taxes; and he has about \$29,000 in non-tax delinquent debt. There is insufficient evidence about why Applicant was unable to make greater documented progress resolving his delinquent debts. There is insufficient assurance that his financial problem is being resolved and will not recur in the future. Under all the circumstances, he failed to establish mitigation of financial considerations security concerns.

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(d):

- (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), “[t]he ultimate determination” of whether to grant a security clearance “must be an overall commonsense judgment based upon careful consideration of the guidelines” and the whole-person concept. My comments under Guideline F are incorporated in my whole-person analysis. Some of the factors in AG ¶ 2(d) were addressed under that guideline but some warrant additional comment.

Applicant is 47-year-old information technology director, and a DOD contractor has employed him since October 2013. For most of the past 18 years he has been employed in information technology. He has completed some college credits. He was unemployed for five months in 2012.

The evidence against grant of a security clearance is more substantial. Applicant did not timely file federal tax returns for tax years 2009 through 2012. He owes an unspecified amount of federal income taxes; and he has about \$29,000 in non-tax delinquent debt. He has known that this issue raises a security concern since his receipt of the SOR. His actions raise unmitigated questions about Applicant's reliability, trustworthiness, and ability to protect classified information. See AG ¶ 18.

It is well settled that once a concern arises regarding an applicant's security clearance eligibility, there is a strong presumption against the granting a security clearance. See *Dorfmont*, 913 F. 2d at 1401. Unmitigated financial considerations security concerns lead me to conclude that grant of a security clearance to Applicant is not warranted at this time. I have carefully applied the law, as set forth in *Egan*, Exec. Or. 10865, the Directive, and the AGs, to the facts and circumstances in the context of the whole person. Financial consideration security concerns are not mitigated. It is not clearly consistent with the interests of national security to grant Applicant security clearance eligibility at this time.

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:	AGAINST APPLICANT
Subparagraphs 1.a through 1.r:	Against Applicant

Conclusion

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

Mark Harvey
Administrative Judge